Supreme Court, U.S.
FILED
94 609 SEP 26 1994
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LOUIS W. PULASTY, Petitioner,

v.

STATE OF NEW JERSEY, Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

John L. Pritchard, Esq.
76 South Orange Avenue, Suite 308
South Orange, New Jersey 07079
(201) 763-8400
Fax (201) 762-2057
Counsel for Petitioner

Of Counsel:
Harold Kamens, Esq.
76 South Orange Avenue, Suite 308
South Orange, New Jersey 07079
(201) 763-2124

September 21, 1994.

QUESTIONS PRESENTED

1. Whether a state court may order a criminal penalty of restitution to be made from retirement payments otherwise protected by the Employees Retirement Income Security Act of 1974 (ERISA), 26 IRC 401(a)(13)(A), 29 USC 1056(d)(1).

2. Whether a state court restitution order requiring a defendant to pay monthly payments of a specified dollar amount is permissible, where all the defendant's income is protected by ERISA or the Social Security Act, 42 USC 407(a).

3. Whether the wage garnishment provisions of 29 USC section 1671 et seq. protects pension benefits from seizure pursuant to a state court criminal restitution order.

4. Whether a guilty plea by a criminal defendant is effective where there is no evidence presented to the court other than the defendant's own statement of guilt.

5. Whether a guilty plea by a criminal defendant is effective under the circumstances, which included a failure by the defendant's legal counsel to discuss the plea of guilty prior to the court appearance.

TABLE OF CONTENTS

QUESTIONS PRESENTED 2

TABLE OF AUTHORITIES 6

OPINIONS BELOW 8

JURISDICTION 9

STATUTORY PROVISIONS INVOLVED 9

STATEMENT OF THE CASE 9

A. Federal Questions Raised 9

B. The Criminal Charges 9

C. The Proceedings Below 12

REASONS FOR GRANTING THE PETITION 15

ERISA AND SOCIAL SECURITY ISSUES

I. The Interpretation by the New Jersey Supreme Court and by the New Jersey Superior Court, of the Employees Retirement Income Security Act (ERISA) and the Social Security Act Conflicts With the Interpretation of This Court 15

II. The Interpretation by the New Jersey Supreme Court and the New Jersey Superior Court of ERISA, the Social Security Act and the Consumer Credit Protection Act Conflicts with That of Other State Courts and the United States Court of Appeals 21

III. The Decision of the New Jersey Supreme Court Regarding ERISA, the Social Security Act and the Consumer Protection Act is Erroneous 24

IV. The Questions Raised by this Case Regarding ERISA, the Social Security Act, and the Consumer Credit Protection Act are Important 26

CRIMINAL LAW ISSUES

V. The Decision of the New Jersey Supreme Court Refusing the Request to Withdraw the Guilty Plea is in Conflict with This Court's Interpretation of the U.S. Constitution, and is Erroneous 27

CONCLUSION. 30

APPENDIX A, Statutory Provisions Involved a-1

APPENDIX B, Opinion of the Supreme Court of New Jersey. a-3

APPENDIX C, Opinion of the Appellate Division of the Superior Court of New Jersey . . . . . a- 11

APPENDIX D, Opinion of the Trial Court on the Restitution Issue . . . . . .a- 28

APPENDIX E, Opinion of the Trial Court on the Withdrawal of the Guilty Plea . . . . . .a- 47

APPENDIX F, Certification of Louis W. Pulasty. a-60

APPENDIX G, Certification of Anna Pulasty. a–69

APPENDIX H, Certification of Elaine Bennett a–71

APPENDIX I, Transcript of the Guilty Plea of
Louis W. Pulasty a–74

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83 (1963) 28

Brosamer v. Mark, 540 N.E.2d 652 (Ind.App. 2 Dist. 1989), *aff'd* 561 N.E.2d 767 (Ind. 1990). 22, 23

Crane v. Kentucky, 476 U.S. 683 (1985). 28

Ellis National Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466 (2nd Cir. 1986) 21, 22

Garner v. Louisiana, 368 U.S. 157 ( ). 28

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S.Ct. 680 (1990). 13, 15, 16, 21, 24, 25

Opper v. United States, 348 U.S. 84 (1954) 27

Perkins v. Kocher, 531 N.E.2d 231 (Ind. App. 2 Dist. 1988) 22, 23

Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973). 17, 18, 19

Pomeranke v. Williamson, 478 N.W.2d 800 (Minn.App. 1991) 21

Porter v. Aetna Casualty Co., 370 U.S. 159 (1962). . . . 18, 19, 20

Smith v. United States, 348 U.S. 147 (1954) 27

Strickland v. Washington, 466 U.S. 668 (1984) 29

Statutes and Rules

15 U.S.C. 1671 9

26 U.S.C. 401(a)(13)(A) [IRC 401(a)(13)(A)] 9, 15, 16

28 U.S.C. 1257(a) 9

29 U.S.C. 1056(d)(1) 9, 15, 22

42 U.S.C. 407(a) 9, 17, 18, 19, 25

N.Y. Penal Law 60.27. 22

Fla. Stat. Ann. 775.089 22

Fla. Stat. Ann. 948.03(1)(e). 22

Miscellaneous

Treas. Reg. 1.401(a)-13(b)(1) 16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

LOUIS W. PULASTY, Petitioner,

v.

STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Louis W. Pulasty respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 136 N.J. 356, 642 A.2d 1392 (1994). The opinion of the Appellate Division of the Superior Court of New Jersey is reported at 259 N.J.Super. 274, 612 A.2d. 952 (App. Div. 1992). The opinions of the trial court are unreported.

JURISDICTION

The Supreme Court of New Jersey entered its judgment on June 28, 1994. The jurisdiction of this Court for a writ of certiorari is invoked under 28 U.S.C. section 1257(a).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth at length at Appendix A, a-1.

STATEMENT OF THE CASE

A. Federal Questions Raised.

The relevant Federal questions concerning the application of ERISA (IRC 401(a)(13(A) and 29 U.S.C. 1056(d)(1)), the Social Security Act (42 U.S.C. 407(a)) and the Consumer Credit Protection Act (15 U.S.C. 1671 et seq.) were first raised in the trial court, the Superior Court of New Jersey, Criminal Part, on Mr. Pulasty's motion to amend the sentence imposed.

The relevant Federal questions concerning the constitutional issues relating to his guilty plea and lack of effective counsel were first raised in the trial court, the Superior Court of New Jersey, Criminal Part, on Mr. Pulasty's motion to withdraw his guilty plea.

B. The Criminal Charges.

In January, 1986, Louis W. Pulasty pleaded guilty to one count of an indictment involving missing funds from a certain checking account of his employer. The administrative manager of the organization, Ms. Barbara Furtney, also pleaded guilty to one count against her.

As part of his sentence, Mr. Pulasty was ordered to make restitution in the amount of $453,378.32. Under the restitution order, Mr. Pulasty was required to convey over his interest in the home he shares with his wife, which they held by tenancy by the entireties, as well as his interest in a house in South Sea Side, New Jersey, which was also held by tenancy by the entireties. A roll-over Individual Retirement Account in the amount of approximately $96,023.00 was also taken.

While an employee of the New Jersey Fireman's Association, Mr. Pulasty was a participant in the Association's pension plan. His interest in this pension was effectively seized by the sentencing order, which read:

"f. commencing June 1, 1988 defendant is to assign all rights to his $531. per month pension from the New Jersey State Firemen's Association to the New Jersey State Firemen's Association, or if this cannot be accomplished, defendant is to pay through the Essex County Probation Department the sum of

$531. per month, until the balance of the restitution is discharged."

Mr. Pulasty's only source of income, other than the Fireman's Association pension, was from Social Security and a pension provided by another former employer.

Mr. Pulasty's guilty plea had been made on January 13, 1986, on the very strong suggestion of his attorney, Michael D'Alessio, Esq., with no preparation and only two prior brief office appointments. Mr. D'Alessio failed to talk over the plea agreement, the possibility of a jail sentence, the merits of the State's case, the possibility of a successful defense before a jury, or any other major issues which he as an attorney had the legal and ethical obligation to cover with a defendant in detail.

When questioned by the trial court judge, Mr. Pulasty was unprepared, confused, frightened and intimidated. He confusion was reflected in the conflicting answers given to the Judge. He clearly lacked an understanding of the information the court was attempting to elicit. His testimony did not provide a factual basis for his guilty plea. There was no corroboration of the defendant's testimony presented to the court by the prosecution from any objective source.

Of the hundreds of New Jersey State Fireman's Association checks written out over the five year period of alleged embezzlement, only $38,944 were written out by the

defendant, all of which were reimbursements for legitimate business expenses incurred by him in connection with the Fireman's Association. Of the remaining checks of more than $600,000.00, Pulasty did not endorse the back or signed the front of the check. Each check bore only his signature rubber stamp on the endorsement line, frequently placed there by co-defendant, Barbara Furtney, in his absence.

In addition to a complete and total absence of evidence from any objective source that Mr. Pulasty had embezzled funds or that he received any of the moneys allegedly taken, it was also apparent that the defendant's lifestyle remained modest without any change in the standard of living.

Until he consulted with a new attorney, Pulasty was unaware that legal action could be taken to address the illegalities he had suffered.

C. The Proceedings Below.

In July, 1990, Mr. Pulasty moved that the restitution order be modified to delete any mention of the Fireman's Association pension plan, and delete the requirement of paying $531.00 per month. Mr. Pulasty argued that the order violated ERISA, as well as 15 U.S.C. 1671 et seq., which provides certain limitations on wage and income garnishments.

On October 26, 1990, the trial court judge agreed that the criminal restitution order violated ERISA, and modified it to delete any reference to the pension plan benefits of $531.00. The new order, however, retained the requirement that Mr. Pulasty pay $531.00 per month. The revised order read as follows:

"f. commencing June 1, 1988, defendant is to pay through the Essex County Probation Department the sum of $531. per month, until the balance of the restitution is discharged."

Mr. Pulasty appealed on the grounds that the revised order constituted an indirect seizure of either his pension benefits or of his Social Security benefits. This is so because his only income was from the Fireman's Association pension, another former employer's pension, and his Social Security. Pulasty again argued that other Federal and state statutes prohibited the seizure of his pension payments.

The Appellate Division of New Jersey affirmed the trial court on different grounds. The Appellate Division held that ERISA does not prevent the seizure of pension benefits when they are taken pursuant to a criminal restitution order. It further distinguished *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365, 110 S.Ct. 680 (1990), by stating "that the fact that *Guidry* involved a criminal restitution was mere happenstance." The Appellate Division did not address the question of the indirect seizure.

In a separate action, Mr. Pulasty had made a motion before the trial court to withdraw his plea of guilty on the grounds of ineffective counsel, and on the grounds that there was no collaborating evidence to support the guilty plea. The motion to withdraw the guilty plea was denied by the trial court. On appeal, the New Jersey Appellate Division affirmed the decision of the trial court not to allow a withdrawal of the guilty plea.

REASONS FOR GRANTING THE PETITION

I. The Interpretation by the New Jersey Supreme Court and the New Jersey Superior Court, of the Employees Retirement Income Security Act (ERISA) and the Social Security Act Conflicts With the Interpretation of This Court.

The United States Supreme Court has held that ERISA protects the pension benefits of a person convicted of a crime from being seized pursuant to a criminal sentence of restitution. *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365 (1990), further held that the literal words of the Employee Retirement Security Act of 1974 is to be interpreted without any judicially-created exceptions.

The Employee Retirement Income Security Act of 1974 (ERISA) was intended to protect the retirement benefits of employees. As part of ERISA, Internal Revenue Code section 401(a)(13)(A) provides that "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."

The parallel labor law provision of ERISA, 29 U.S.C. section 1056(d)(1), provides "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Although there are certain exceptions to this general rule, such as those relating to the enforcement of a Federal tax levy or certain domestic relations orders, none of these exceptions apply in the present case.

The regulations issued pursuant to IRC 401(a)(13), state at Treas. Reg. section 1.401(a)-13(b)(1) that any garnishment or similar process is prohibited by the statute:

"Under section 401(a)(13), a trust will not be qualified unless the plan of which he trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."

The U.S. Supreme Court has again recently held that a garnishment or other process is prohibited by the "assignment or alienation" provision of ERISA. *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365, 110 S.Ct. 680 (1990). The *Guidry* case involved a situation in which a criminal defendant had been found guilty of theft, and a civil judgment was also rendered against him. The trial court ordered that a constructive trust be imposed on his ERISA-protected pension benefits.

In *Guidry,* the United States Supreme Court held that the words of ERISA must be read literally, and there could be no exceptions to the protections afforded to pension benefits unless the exception was found in the statute. The Court stated at 110 S.Ct. 687-688:

"Nor do we think it appropriate to approve any generalized equitable exception--either for employee malfeasance or for criminal misconduct--to ERISA's prohibition on the assignment of alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task . . .

"Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear. In addition, as has been noted above, the malefactor often is not the only beneficiary of the pension."

The New Jersey Supreme Court did not reach the real issue of whether ERISA protects pension assets from criminal restitution orders. Instead, it noted that the trial court's order, as amended, required a certain amount to be paid each month, and held that ERISA provided no protection once payments pass into a retiree's hands. This holding is squarely inconsistent with the rulings of this Court.

This Court has held that Social Security benefits deposited into a bank account retain their character as such, and therefore are protected from execution under 42 U.S.C. 407(a). *Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973).

Similarly, this Court has held that veterans' benefits deposited in a savings and loan retain their character as such, and are therefore protected from execution under the applicable Federal statute. *Porter v. Aetna Casualty Co.,* 370 U.S. 159 (1962).

Under the Social Security Act, 42 U.S.C. 407(a), none of the moneys paid "shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." There is no specific provision as to payments which have passed to the beneficiary.

In *Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973), the appellant received welfare benefits from the State of New Jersey, and executed an agreement to reimburse the county welfare board out of any subsequently discovered or acquired property. He was later awarded retroactive Social Security disability payments, which he gave to Philpott to hold as a trustee for him in a bank account. The State sued to collect the owed funds from the bank account.

This Court in *Philpott* stated at 409 U.S. at 416:

"The protection afforded by section 407 is to 'moneys paid' and we think the analogy to veteran's benefits exemptions which we reviewed in *Porter v. Aetna Casualty Co.*, 370 U.S. 159, is relevant here. We held in that case that veteran's benefits deposited in a savings and loan association on behalf of a veteran

retained the 'quality of moneys' and had not become a permanent investment." Id., at 161-162.

"In the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained the quality of 'moneys' within the purview of section 407."

The Supreme Court in *Philpott* stated that section 407(a) "imposes a broad bar against the use of any legal process to reach all social security benefits." 409 U.S. at 417.

Under 38 U.S.C. 3101(a), payments administered by the Veterans' Administration are exempt from the "claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The statute does not specifically address whether a seizure can be made after the payments pass into a bank account.

In *Porter v. Aetna Casualty Co.,* a creditor had attached the bank accounts of a veteran, who had deposited his disability payments into these accounts. The question was whether the money still retained its original character once it was converted into an investment in a bank account. This Court held that the money was still exempt, and stated at 370 U.S. at 162:

"Since legislation of this type should be liberally construed, [cite], to protect funds granted by the congress for the maintenance and support of the beneficiaries thereof, [cite] we

feel that deposits such as are involved here should remain inviolate. The Congress, we believe, intended that veterans in the safekeeping of their benefits should be able to utilized those normal modes adopted by the community for that purpose--provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into regular investments." 370 U.S. at 162.

In a concurring opinion, Justice Douglas stated that the funds should be considered intact so long as they were in a liquid form, available for the support and maintenance of the veteran. 370 U.S. at 162–164.

If similar language in a Federal statute protects both Social Security benefits and veterans' benefits once they pass into the hands of the recipient, even after passing into a bank account, then similar language in ERISA should do likewise, and for the same policy reasons.

Because the decision of the New Jersey Supreme Court is in conflict with the opinions of the United State Supreme Court, certiorari should be granted in this case.

II. The Interpretation by the New Jersey Supreme Court and the New Jersey Superior Court of ERISA, the Social Security Act and the Consumer Credit Protection Act, Conflicts With That by Other State Courts and the U.S. Court of Appeals.

It was squarely held by the Minnesota Court of Appeals in *Pomeranke v. Williamson,* 478 N.W.2d 800 (Minn.App. 1991) that ERISA-protected benefits are not subject to seizure under a criminal restitution order. In *Pomeranke,* a criminally-convicted defendant, subject to a restitution order, sought to obtain payment of part of his ERISA-protected pension funds. Certain parties sought an order for the payments coming out to go directly to the restitution. Citing the phrase in *Guidry* referring to "criminal misconduct", the court held that ERISA protected these benefits. 478 N.W.2d at 801.

The opinions of New Jersey Supreme Court and the New Jersey Appellate Division in this case are also in conflict with the opinion of the United States Court of Appeals for the Second Circuit in *Ellis National Bank v. Irving Trust Co.,* 786 F.2d 466 (2nd Cir. 1986). The *Ellis* case involved criminal restitution sentences imposed under the laws of New York and Florida. The defendant was a stockbroker for Prudential-Bache who plead nolo contendre to grand theft and securities fraud. He was sentenced to prison time, a fine and criminal restitution. 786 F.2d at 467.

One of the precise questions before the Second Circuit in *Ellis* was whether 29 USC 1056(d)(1) preempted the New York State criminal restitution statute, N.Y. Penal Law section 60.27 (McKinney 1980 and Supp. 1984) and the Florida criminal restitution statute, Fla. Stat. Ann. sections 775.089 and 948.03(1)(e). This latter section of the Florida restitution statute states that restitution may be a condition of probation. 786 F.2d at 469. The court held that ERISA's anti-alienation rule preempted "the state laws of restitution and constructive trusts invoked by Bache." 786 F.2d at 469.

The above cases involved criminal sentences of restitution. The facts of this case are also closely on point with the civil case of *Perkins v. Kocher,* 531 N.E.2d 231 (Ind.App.2 Dist. 1988), but see *Brosamer v. Mark,* 540 N.E.2d 652 (Ind.App. 2 Dist. 1989). In *Perkins,* the defendant owed money on a civil judgment. The trial court ordered him to pay $200.00 per month, though his only income was from Social Security, an ERISA-protected pension, and certain disability payments. The appellate court found that such an order could not be issued, as it would conflict with the purpose of ERISA:

"The primary purpose of ERISA is to protect people who depend on these benefits for financial independence after they retire. [cite]. It would be illogical to conclude that benefits are protected only until the moment they are paid to the pensioner, probably when they are most needed. Such benefits are analogous to benefits received under the Railroad Retirement Act and social security disability plans and should therefore receive

the same treatment as long as they retain the 'quality of moneys' and can be easily identified as payment from exempt funds, and have not yet become permanent investments."

The holding of *Perkins v. Kocher* was overruled in *Brosamer v. Mark,* 540 N.E.2d 652 (Ind.App. 2 Dist. 1989), *aff'd, Brosamer v. Mark,* 561 N.E.2d 767 (Ind. 1990).

In *Brosamer v. Mark,* 561 N.E.2d 767 (Ind. 1990), the Indiana Supreme Court held that once ERISA benefits are paid over to the beneficiary they lose their protected status. This is consistent with the holding of the New Jersey Supreme Court in this case.

However, the *Brosamer* case is also contrary to the holding of the New Jersey court, however, since it held that once Social Security benefits are paid over to the beneficiary, they retain their protected status. 561 N.E.2d at 768 n. 1.

The New Jersey courts simply failed to address the issues raised by Mr. Pulasty regarding his rights under the Social Security Act, in that the order to pay certain dollar amount each month requires him to pay over his ERISA benefits or his Social Security benefits.

III. The Decision of the New Jersey Supreme Court Regarding ERISA, the Social Security Act and the Consumer Credit Protection Act is Erroneous.

The present case involves a specific court order for the defendant to pay over an amount of money each month which was believed to be equal to his monthly pension benefits under the plan. It is clear that such an arrangement is both a garnishment and an alienation of his pension benefits. The equivalency between such an order and a garnishment or execution of the pension benefits is well established with respect to the Federal anti-garnishment statute, and also the caselaw regarding the Social Security Act.

This Court in *Guidry* clearly saw any such order as a garnishment: "The view that the statutory restrictions on assignment or alienation of pension benefits apply to garnishment is consistent with applicable administrative regulations." 493 U.S. at 371-372, 110 S.Ct. at 685. There is another reference in *Guidry*, at 493 U.S. at 369, 110 S.Ct. at 684, recognizing that "the anti-alienation provision generally prohibits the garnishment of pension benefits as a means of collecting a judgment". Garnishment is in fact a seizure once the assets come to the hands of the recipient.

The interpretation of the New Jersey Supreme Court totally destroys the policy behind ERISA, since as soon as the funds come out, they will be seized. What good is it to protect

the benefits while they are still in the plan, and allow them to be entirely seized once they pass through to the beneficiaries?

The policy of ERISA, as this Court stated in *Guidry,* 110 S. Ct. 687:

"reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them.

This policy would be totally defeated if the decision of the Supreme Court of New Jersey below is correct.

In the case at hand, Mr. Pulasty's only income is from Social Security and other exempt sources, and the Court below has ordered him to make payments from these exempt sources. He has been ordered to pay restitution from funds which although deposited in a bank, originate from Social Security and pension benefits.

It should be noted that the anti-alienation provision of the Social Security Act, 42 U.S.C. 407(a), was also cited for support by the Supreme Court in *Guidry,* in holding pension benefits exempt from levy, attachment, garnishment or other process. 110 S.Ct. at 685, n.13.

IV. The Questions Raised by this Case Regarding ERISA, the Social Security Act, and the Consumer Credit Protection Act are Important.

The questions regarding ERISA and Social Security benefits are very important because both these programs are important sources of income to many indigent individuals who will suffer if the funds they receive are subject to levy.

If the New Jersey Supreme Court decision is correct, then any judgment debtor on a civil action may be ordered to pay over a specified dollar amount each month, even if the debtor must use his Social Security or ERISA benefits to do so.

Moreover, the present case also involves the Consumer Credit Protection Act, which assures a minimum level of subsistence for indigent persons.

CRIMINAL PART

V. The Decision of the New Jersey Supreme Court Refusing the Request to Withdraw the Guilty Plea is in Conflict with This Court's Interpretation of the U.S. Constitution, and is Erroneous.

In *Opper v. United States,* 348 U.S. 84, 89–90, 75 S.Ct. 158 (1954), it was held that a confession is not sufficient to sustain a conviction in the absence of any other proof. In the present case, the defendant's guilty plea alone should not be sufficient to sustain a conviction since there was no other evidence presented of the defendant's guilt. Proof of the corpus delicti is required. An accused may not be convicted on his own uncorroborated confession. *Smith v. United States,* 348 U.S. 147 (1954).

There was no independent factual basis for the defendant's guilty plea. It is solely Mr. Pulasty's "confession" while placing his guilty plea on the record that provided the factual basis for his conviction. The decision of the New Jersey Supreme Court that this was sufficient to uphold the plea is in conflict with the precedents of this Court.

The allegations of embezzlement against Mr. Pulasty were not testified to at trial, nor was independent admissible

evidence corroborating the allegations presented by the prosecution at the guilty plea hearing, i.e., Ms. Furtney did not testify and there were no witnesses from the bank where the checks were cashed. Moreover, not a single check out of the hundreds and hundreds of Association checks at issue were endorsed by Pulasty or had his actual hand written signature on the front of the draft.

As stated in *Crane v. Kentucky,* 476 U.S. 683, 689 (1985), "Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise unworthy of belief.'" A state conviction of a crime totally devoid of evidentiary support is unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Garner v. Louisiana,* 368 U.S. 157.

The prosecution has a nondelegable responsibility to furnish the defendant with all exculpatory information that the prosecution possessions. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). Any evidence obtained from co-defendant Barbara Furtney regarding her role in the embezzlement and implication of others should have been fully disclosed to Pulasty and his attorney during the discovery process.

The New Jersey Appellate Division in this matter concluded that "Pulasty fully understood the nature and

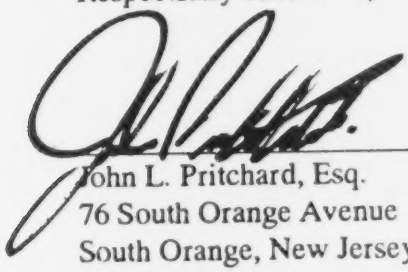
consequences of the pleas [and] intelligently waived his right to trial". This holding was affirmed by the New Jersey Supreme Court. But the facts do not support this finding. In addition, the conclusion is in conflict with the rule that a guilty plea cannot be accepted until the trial court is satisfied that the defendant entered into it knowingly and voluntarily and with an understanding of its consequences.

Finally, the decision of the Appellate Division that the defendant had adequate assistance of counsel is in conflict with the holding of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). The record indicates unequivocally in the defendant's affidavit that he was not represented properly and in accordance with constitutional standards. Had he been, the guilty plea never would have been entered.

CONCLUSION

The petition for a writ of certiorari should be granted.

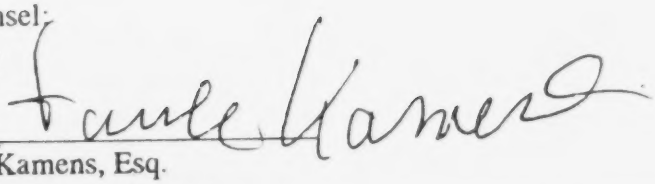
Respectfully submitted,



John L. Pritchard, Esq.
76 South Orange Avenue
South Orange, New Jersey 07079
(201) 763-8400
Fax (201) 762-2057
Counsel for Petitioner

September 21, 1994.

Of Counsel:



Harold Kamens, Esq.
76 South Orange Avenue
South Orange, New Jersey 07079
(201) 763-2124

September 21, 1994.

APPENDIX A

STATUTES INVOLVED

IRC 401(a)(13(A):

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. 1056(d)(1):

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

42 U.S.C.A. 407 (The Social Security Act):

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this

section except to the extent that it does so by express reference to this section.

15 U.S.C. 1672(a):

The term 'earnings' . . . includes periodic payments pursuant to a pension or retirement program.

15 U.S.C. 1672(b):

The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

15 U.S.C. 1672(c):

The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of a debt.

APPENDIX B

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS PULASTY,

Defendant-Appellant.

Argued September 14,1993 -- Decided June 28, 1994

On certification to the Superior Court, Appellate Division, whose opinion is reported at 259 N.J. Super. 274 (1992).

Martha A. Suhayda-Vogt and John L. Pritchard argued the cause for appellant (Ms. Suhayda-Vogt, Mr. Pritchard, and Harold Kamens, attorneys).

Hilary L. Brunell, Assistant Prosecutor, argued the cause for respondent (James F. Mulvihill, Acting Essex County Prosecutor, attorney).

PER CURIAM

Defendant pleaded guilty to second-degree theft by deception. The trial court ordered him to make restitution to his employer. On defendant's appeal the Appellate Division affirmed, and we granted certification, 133 N.J. 430 (1993). Substantially for the reasons set forth in the Appellate Division

opinion, see 259 N.J. Super. (1993), we reject defendant's argument that the trial court should have permitted him to withdraw his guilty plea. We likewise agree with the court below, although on a different basis, that the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. Sections 1001-1461 (ERISA), does not preempt the trial court's restitution order.

I

Defendant, Louis Pulasty, was treasurer of the New Jersey State Firemen's Association. A grand jury charged him, in a twenty-nine count indictment, with embezzling more than $600,000. According to the trial court, the charge exposed defendant to a twenty-year term of imprisonment and $200,000 in fines, in addition to restitution. In July 1986, pursuant to a plea bargain, defendant pleaded guilty to second-degree theft by deception in violation of N.J.S.A. 2C:20-4 and agreed to pay restitution. The trial court sentenced defendant to five years imprisonment and ordered him to pay $453,378.32 in restitution. Defendant served fourteen months in prison, after which he completed probation.

In July 1990 defendant moved to have the trial court strike certain language in its restitution order that required defendant either to assign to the Firemen's Association the $531-per-month pension that it paid to defendant, or in the alternative to pay the Essex County Probation Department $531 per month

until defendant had discharged the balance of his restitution obligation. In light of defendant's argument that the order as phrased violated the anti-alienation provisions of ERISA, 29 U.S.C.A. 1056(d), the trial court deleted the reference to defendant's pension but left in place so much of the order as imposed on defendant the obligation to make restitution of $531 per month.

In 1991, five year after he had entered his guilty plea, defendant moved to withdraw his plea. The trial court denied the motion. Defendant then began two separate appeals. In the first, defendant argued that the denial of his motion to withdraw his guilty plea was manifestly unjust because, first, the plea lacked a factual basis; second, defendant had not voluntarily and intelligently made the plea because he had not understood its consequences; and, third, defendant had been deprived of effective assistance of counsel. Pursuant to Rule 2:11-3(e)(2), the Appellate Division found those claims to be "entirely lacking in merit." 259 N.J. Super. at 278. The court stated that the record "demonstrated conclusively" that defendant had understood his plea, that he had voluntarily pleaded guilty, and that the record supported his conviction for second-degree theft. It also found "not a shred of evidence" to support defendant's claim that his counsel had provided ineffective assistance or that but for any error of counsel, defendant would not have entered a plea of guilty. On defendant's first appeal, therefore, the Appellate Division affirmed the judgment of the trial court. Id. at 278-79.

On the second appeal, defendant, whose sole source of income is the combined Social Security payments that he and his wife receive ($1581 per month), a pension benefit from the Firemen's Association ($558 per month), and a pension from Foster Wheeler Corporation ($123 per month), argued that ERISA and 42 U.S.C.A. Section 470 of the Social Security Act prohibited the trial court from ordering that he pay $531 per month in restitution because the restitution would come from sources that, defendant asserted, those laws protected. Specifically, defendant claimed that the trial court's modified order directly or indirectly garnished his pension in violation of ERISA, U.S.C.A. Section 1056(d)(1), which provides that "[e] pension plan shall provide that benefits provided under the plan may not be assigned or alienated." To support that argument defendant relied on Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990).

In Guidry, a union official had pleaded guilty to embezzling funds from his employer union. Id. at 367, 110 S. Ct. at 683, 107 L. Ed. 2d at 789. The United States Supreme Court held that a constructive trust on the official's pension benefits established to satisfy a civil judgment in favor of the union was no different from a garnishment order, id at 371-72, 110 S. Ct. at 685, 107 L. Ed. 2d at 792, and that both were barred by ERISA's

anti-alienation clause. Id. at 376-77, 110 S. Ct. at 687-88, 107 L. Ed. 2d at 794-95.

The Appellate Division distinguished Guidry on the basis that Guidry was limited to civil cases and did not prohibit restitution as part of a criminal penalty under a plea bargain. 259 N.J. Super. at 283-84. In doing so, the court below characterized the criminal misconduct underlying the restitution in Guidry as "mere happenstance." Id. at 282-83. The court concluded that because criminal restitution is designed to strip a defendant of wrongful monetary gain, it is unlike a civil judgment, which is designed to make the victim whole, and is therefore not contemplated by the anti-alienation clause of ERISA, which is designed to protect pensioners from losing their benefits to creditors. Id. at 283-84. It therefore upheld the trial court's modified restitution order.

II

On appeal to this Court, defendant makes substantially the same arguments as he raised before the Appellate Division. As indicated above, in respect of defendant's motion to withdraw his plea and the allegedly ineffective assistance of counsel, we affirm on the basis of the opinion below.

On defendant's inalienability claim, we also affirm, but we do not adopt the Appellate Division's distinction between the

applicability of ERISA's non-alienability clause in criminal cases and its inapplicability in civil cases. Our decision requires no such distinction.

We hold instead that Guidry is inapplicable to this case because the Guidry Court dealt with an attempt to place a constructive trust on the defendant's pension. The Court ruled that ERISA's non-alienability clause barred such an action. 493 U.S. at 376-77, 110 S. Ct. at 687-88, 107 L. Ed. 2d at 795. Here, we are not faced with an attempt to place a constructive trust on defendant's pension benefits. The trial court specifically deleted from its original restitution order any reference to those benefits. This case instead involves the ability of the State, under a generally-applicable criminal law, to require a defendant to make restitution after the pension funds have been paid over to defendant. That issue is closer to the one that faced the Supreme Court of Indiana in Brosamer v. Mark, 561 N.E. 2d 767 (1990).

In Brosamer, the plaintiffs won a $718 judgment against defendant, Brosamer. Brosamer claimed that the court could not garnishee his income because his sole sources of income were pension benefits that qualified for ERISA non-alienability protection and Social Security benefits. The court declared that to hold, as defendant urged, that pension payments continue to be protected by ERISA after deposit into the recipient's bank account "would run contrary to the legislative history and weight of the relevant case law and [would] stretch ERISA beyond the

purposes declared by Congress in the statute itself." Id. at 769. We agree with the Indiana Supreme Court that ERISA's non-alienability clause is based on a congressional intent to ensure that pensioners actually receive their benefits, not to make them judgment proof. See id. at 770 (discussing relevant case law). We therefore hold that one a defendant has actually received pension benefits, those benefits are subject to judgment.

Our decision today creates no exception to ERISA's non-alienability clause. That clause is inapplicable in a case such as this, which concerns restitution to be paid out of funds that are unprotected because they are in the pensioner's possession, not out of protected benefits that are owed to the pensioner. Cf. Woolsey v. Marion Lab., Inc., 934 F.2d 1482, 1458 (10th Cir. 1991) (stating that ERISA's non-alienability clause's prohibition of forfeiture, garnishment, or offsetting of vested pension rights is inapplicable to decision to award pension benefits in form of cash instead of stock). We are satisfied that "the congressional policy choice" contained in the non-alienability clause, specifically the "decision to safeguard a stream of income for pensioners (and their dependents * * *), even if that decision prevents others from securing relief for wrongs done to them, "Guidry, supra, 493 U.S. at 376, 110 S. Ct. at 687, 107 L. Ed. 2d at 795, was not designed to make pensioners judgment proof. The inclusion of a spendthrift provision "secure[s] the financial well-being of employees and their dependents," Ablamis v. Roper, 937 F.2d 1450, 1454 (9th Cir. 1991), and we recognize that the creation of

an exception to the statute "is a question for legislative rather than judicial judgment." United Metal Prods. Corp. v. National Bank of Detroit, 811 F.2d 297 300 (6th Cir. 1987). However, the power to order restitution out of unprotected funds, see N.J.S.A. 2C:44-3 (authorizing fines and restitution), is "a state law of general application with only a 'tenuous' effect on an ERISA plan * * *." Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1274 (9th Cir. 1990) (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 2901 n.21, 77 L. Ed. 2d 490, 503 n.21 (1983)). Accordingly, the non-alienability clause does not apply.

III

Judgment affirmed.

CHIEF JUSTICE WILENTZ and JUSTICES CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI, and STEIN join in the Court's opinion.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1609-90T4
A-3280-90T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS PULASTY,

Defendant-Appellant.

Argued February 4, 1992 - Decided August 4, 1992.

Before Judges Long, Baime and Thomas.

On appeal from Superior Court, Law Division, Essex County.

John L. Pritchard argued the cause (A-1609-90T4) on behalf of appellant (Rajat K. Gupta, on the brief).

Martha A. Suhayda-Vogt argued the cause (A-3280-90T1) on behalf of appellant.

Hilary L. Brunell argued the causes on behalf of respondent (Herbert H. Tate, Jr., Essex County Prosecutor, attorney).

The opinion of the court was delivered by LONG, J.A.D.

In January 1986, defendant Louis Pulasty entered a guilty plea to one count of second-degree theft by deception, contrary to N.J.S.A. 2C:20-4, as a part of a plea bargain involving a twenty-nine count indictment which charged him with embezzlement of more than $600,000.00 from the New Jersey State Firemen's Association of which he was treasurer. As a part of the plea bargain, Pulasty agreed to pay restitution to his former employer. He was sentenced to a five-year custodial term and, following a hearing, was ordered to pay $453,378.32 in restitution in a lump sum of $200,000.00 with monthly installments of $2,000.00 to follow. After an appeal to this court, the restitution order was modified both as to the amount of the lump sum payment and the monthly installments.

In July 1990, Pulasty moved before the trial judge to eliminate the following provision from the restitution order:

> [C]ommencing June 1, 1988 defendant is to assign all rights to his $531.00 per month pension from the New Jersey State Firemen's Association to the New Jersey State Firemen's Association, or if this cannot be accomplished, defendant is to pay through

> the Essex County Probation Department the sum of $531.00 per month, until the balance of the restitution is discharged.

In support of the motion, Pulasty argued that his entire source of income is the combined Social Security he receives with his wife in the amount of $1,581.00, a $558.00 per month Fireman's Association pension and a $123.00 per month pension from the Foster Wheeler Corporation. He urged that the pensions were insulated from assignment by the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. Sections 1001 to 1461 (ERISA). In agreeing to amend the restitution order to eliminate the assignment, the trial judge stated:

> [T]here was and is other monthly income from another pension, from social security benefits, as well as social security benefits to his wife. I take, as I did back on May 6, 1988, all of those things into account in setting the amount of restitution here and I'm not persuaded to amend that amount or to delete anything from that amount. The amount I said was $531.00 a month at that time. I'm not persuaded to amend that in any way other than to delete the portion of the order that requires assignment of pension rights which, of course, was not done in any event.

In 1991, Pulasty moved to withdraw his guilty plea, which motion was denied.

Pulasty now appeals, urging on A-1609-90T4 that:

POINT I:

UNDER ERISA, PENSION BENEFITS MAY NOT BE DIRECTLY OR INDIRECTLY SUBJECTED TO GARNISHMENT OR ANY OTHER LEGAL PROCESS.

POINT II:

THE ANTI-ALIENATION RULES OF ERISA ARE NOT SUBJECT TO JUDICIALLY-CREATED OR EQUITABLE EXCEPTIONS, EVEN IN THE CASE OF A STATE CRIMINAL RESTITUTION STATUTE.

POINT III:

SOCIAL SECURITY BENEFITS ARE EXEMPT FROM DIRECT OR INDIRECT LEVY, ATTACHMENT, GARNISHMENT, OR OTHER LEGAL PROCESS.

POINT IV:

A REASONABLE INTERPRETATION OF ERISA AND THE SOCIAL SECURITY ACT MUST PROHIBIT A RESTITUTION ORDER FOR MONTHLY PAYMENTS UNDER THE CIRCUMSTANCES.

POINT V:

PERIODIC PAYMENTS UNDER A PENSION PLAN CONSTITUTES INCOME SUBJECT TO THE LIMITATIONS ON EXECUTION OF N.J.S.A. 2A:17-50 AND N.J.S.A. 2A:17-56.

POINT VI:

THE STATUTORY LIMITATIONS ON INCOME EXECUTIONS MAY NOT BE CIRCUMVENTED BY AN ORDER WHICH REQUIRES THE JUDGMENT DEBTOR TO

PAY INSTALLMENTS FROM THE PROCEEDS OF EXEMPT INCOME.

POINT VII:

THE POWER OF THE COURT TO ENFORCE THE PAYMENT OF RESTITUTION IS LIMITED TO THOSE MEASURES AUTHORIZED FOR THE COLLECTION OF AN UNPAID CIVIL JUDGMENT.

POINT VIII:

UNDER FEDERAL LAW, AN EXECUTION AGAINST A PENSION PAYMENT MAY NOT EXCEED 25 PERCENT OF THE NET AMOUNT EVEN IN THE CASE OF RESTITUTION ORDERS.

POINT IX:

THE MONTHLY PAYMENTS PREVIOUSLY PAID BY THE DEFENDANT SHOULD BE RETURNED TO HIM, WITH INTEREST, AND THE DEFENDANT SHOULD BE AWARDED COUNSEL FEES.

In a separate appeal (A-3280-90T1), Pulasty challenges the trial judge's denial of his motion to withdraw the guilty plea. He contends:

POINT I:

A DEFENDANT MAY WITHDRAW A GUILTY PLEA AFTER SENTENCING TO CORRECT A MANIFEST INJUSTICE; THERE IS NO PROCEDURAL BAR TO HIS WITHDRAWAL.

POINT II:

DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEAWAS TIMELY.

POINT III:

THERE WAS NO FACTUAL BASIS FOR THE DEFENDANT'S GUILTY PLEA.

POINT IV:

THE DEFENDANT'S PLEA WAS NOT KNOWINGLY AND VOLUNTARILY MADE, NOR DID HE UNDERSTAND ITS CONSEQUENCES.

POINT V:

DEFENDANT HAD INADEQUATE COUNSEL VIOLATING HIS CONSTITUTIONAL RIGHTS.

We have carefully reviewed this record in light of the claims advanced and have concluded that there is no warrant for our intervention.

A-3280-90T1

We turn first to Pulasty's appeal from the denial of his motion to withdraw his plea five years after it was entered and long after the custodial portion of his sentence was completed. We find the arguments raised in connection with this issue to be entirely lacking in merit. R.2:11-3(e)(2). This record demonstrates conclusively that Pulasty fully understood the

nature and consequences of the plea, intelligently waived his right to proceed to trial, and gave an adequate factual basis to undergird a conviction for second degree theft by deception. There is not a shred of evidence in this record to support his contention that his counsel, who negotiated this substantially beneficial plea, fell short of any objective standard of reasonableness or that, but for counsel's errors, the plea would not have been entered. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985). We thus affirm the denial of defendant's motion to withdraw his plea.

1 We consolidate these appeals for disposition.

A-1609-90T4

The more complicated of the two appeals arises out of defendant's contention that ERISA and the Social Security law prohibited the trial judge from directly or indirectly alienating his pension and social security payments. We turn first to ERISA.

Both parties agree that defendant's pension is governed by ERISA, which contains an anti-alienation clause prescribing that: "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C.A. Section 1056(d)(1). The legislative history of this provision has been described as "sparse" (Ellis National Bank of Jacksonville v. Irving Trust Co., 786 F.2D 466, 470 (2d Circ. 1986)) and inconclusive, General Motors Corp. v. Buha, 623 F.2d 455, 460

(6th Cir. 1980). It apparently originated in the House Report from the Committee on Ways and Means, which stated that pension "plans must provide that retirement benefits may not be assigned or alienated, except for voluntary and revocable assignments of not more than 10 percent of the benefits." H.R. Rep. No. 807, 93d. Cong., 2d Sess. (1974), reprinted in, 1975 U.S.C.C.A.N. 4670, 4695. The purpose was "[t]o further ensure that the employee's accrued benefits are actually available for retirement purposes...." H.R. Rep. No. 807, 1974 U.S.C.C.A.N. at 4734. The Joint Conference Report of the House and Senate explained the "alienation" provision as follows:

> Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by any employee which is not for purpose of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment. [H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in, 1974 U.S.C.C.A.N. 5038, 5061].

After some courts had recognized equitable exceptions to the anti-alienation provision, see, e.g., Crawford v. LaBoucherie Bernard Ltd., 815 F.2d 117 (D.C. Cir.), cert. denied, 484 U.S. 943, 108 S. Ct. 328, 98 L. Ed. 2d 355 (1987); St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550 (11th Cir. 1985); American

Telephone & Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); by allowing the assignment of pension payments to meet family support obligations, Congress amended ERISA in 1984 to include such an exception. See Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (current version at 29 U.S.C.A. Section 1056(d)(3)). The legislative history does not suggest that the Congress ever considered other general equitable exceptions to the anti-alienation clause, or a specific exception for criminal restitution. See S. Rep. No. 575, 98th Cong., 2d Sess. 18-19 (1984), reprinted in, 1984 U.S.C.C.A.N. 2547, 2564-65.

Pulasty argues that to the extent that there is any room for interpretation as to the scope of the anti-alienation clause, it has been laid to rest by the United States Supreme Court in its decision in Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990). Guidry resolved a substantial split in the federal circuits as to whether courts could carve out equitable exceptions to the anti-alienation clause. See St. Paul Fire and Marine Ins. Co. v. Cox, supra, 752 F. 2d at 552 (felony theft from pension fund threatens ERISA objective of preserving fund for beneficiaries; court can garnish thief's pension to protect fund members from his theft); Stobnicki v. Textron, Inc., 868 F.2d 1460, 1464-65 (5th Cir. 1989) (court has power to avoid absurd result not contemplated by anti-alienation provision of ERISA, agreeing with Eleventh Circuit that wrongdoer should not profit from his misdeeds by operation of ERISA's anti-alienation provision); Crawford v. La

Boucherie Bernard Ltd., supra, 815 F.2d at 121 (where defendants stole more than $900,000.00 from pension in violation of their fiduciary duties, court could order offset of their pension benefits against their judgment debt to the plan). But see United Metal Products Corp. v. National Bank of Detroit, 811 F.2d 297, 300 (6th Cir. 1987), cert. dismissed, 485 U.S. 1017, 108 S. Ct. 1494, 99 L. Ed. 2d 883 (1988) (there is no fraud exception to the anti-alienation provision of ERISA); Ellis National Bank of Jacksonville v. Irving Trust Co., supra, 786 F.2d at 471 (no ERISA exception for fraud; even where pension plan must pay for fraud of its employee, it cannot garnish that employee's pension); see also Crausman v. Curtis-Wright Corp., 676 F. Supp. 1302, 1304 (D.N.J. 1988) (pension benefits must be paid to employee fired for financial irregularities committed in his administration of the plan; there is no fraud exception to ERISA's anti-alienation provision).

In Guidry, supra, a union official pleaded guilty to embezzlement of funds from the union. The union subsequently initiated a civil action which resulted in a $275,000.00 judgment against the official. 493 U.S. at 367, 110 S. Ct. at 682, 107 L. Ed. 2d at 789. This judgment was sought to be enforced by imposition of a constructive trust on the official's pension benefits until such time as the judgment was satisfied. Id. at 368-69, 110 S. Ct. at 683, 107 L. Ed. 2d at 790-91. The Supreme Court held that a constructive trust was not different from garnishment and that both were barred by the anti-alienation provision of ERISA. Id. at 371-72, 110 S. Ct. at 685, 107 L. Ed. 2d at 792. In finding

that neither other federal statutes nor general principles of equity could overcome ERISA's ban on alienation of pension benefits, the Court explained:

> Nor do we think it appropriate to approve any generalized equitable exception -- either for employee malfeasance or for criminal misconduct -- to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps unusually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an anti garnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular

circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear. In addition, as has been noted above, the malefactor often is not the only beneficiary of the pension. [Guidry v. Sheet Metal Workers National Pension Fund, supra, 493 U.S. at 376–77, 110 S. Ct. at 687–88, 107 L. Ed. 2d at 795 (footnote omitted)].

The ERISA cases since Guidry have disapproved applications of a fraud exception in the context of a civil judgment, see Herberger v. Shanbaum, 897 F.2d 801, 804 (5th Cir. 1990), cert. denied, _____ U.S. _____, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990), and found that health and welfare benefits (as distinguished from pension benefits, which are treated differently in ERISA with respect to alienability and assignability), may be alienated or assigned. See United States v. Teamsters, 753 F. Supp. 1181, 1184 (S.D.N.Y. 1990), aff'd in part, rev'd in part (on other grounds), 899 F.2d 143 (2d Cir. 1990); FMC Corp. v. Holliday, 498 U.S. 111 S. Ct. 403, 408, 112 L. Ed. 2d 356, 369 (1990) (ERISA preempts Pennsylvania statute which barred insurer's lien against tort recovery for benefits paid to its insured).

In terms of the issue presented here, Pulasty points to the fact that Guidry specifically refused to find a "generalized equitable exception -- either for employee malfeasance or for criminal misconduct -- to ERISA's prohibition on the assignment

or alienation of pension benefits." 493 U.S. at 376, 110 S. Ct. at 687, 107 L. Ed. 2d at 795. He reads this language as ending our inquiry. We disagree. The criminal misconduct element of Guidry was mere happenstance. What was at issue there was a civil suit by a victim which resulted in a judgment which the victim sought to enforce through the debtor's pension. This situation is exactly what ERISA was intended to prohibit and is wholly distinct from what is before us: restitution ordered as part of a criminal penalty which resulted from a plea bargain in which Pulasty gained the benefit of his agreement with the prosecutor.

Pulasty also invokes the Second Circuit's opinion in z Ellis which declared that ERISA did not "except from its breadth the state laws of restitution and constructive trust." 786 F.2d at 469. Like Guidry, this enunciation derives its meaning from the civil context in which it arose. Ellis involved an application for a constructive trust in a civil fraud case and Guidry an ordinary civil judgment which the creditor sought to satisfy out of the miscreants' pension. That the debtor in each of these cases was the subject of a successful separate criminal action was probably the genesis of the Court's passing reference in Guidry to "criminal misconduct." It is, however, irrelevant to the question of whether those decisions were meant to apply the anti-alienation clause to criminal restitution. We think they were not and that, in fact, the entirely distinct framework of criminal restitution directs an opposite conclusion.

Unlike a civil judgment which is intended as a vehicle to make the victim whole, the purpose of restitution is to strip a

defendant of pecuniary gain from the crime where that gain is directly related to the crime itself and the defendant has the ability (though not necessarily the immediate means) to pay. State v. Topping, 248 N.J. Super. 86, 89-90 (App. Div. 1991); State v. Townsend, 222 N.J. Super. 273, 279 (App. Div. 1988); State v. Paladino, 203 N.J. Super. 537, 547 (App. Div. 1985); N.J.S.A. 2C:44-2a. Like punishment, rehabilitation and deterrence, the other aims of criminal restitution, disgorgement of the ill-gotten gain is a far reaching goal quite distinct from the traditional compensatory rationale of the civil law. See In re Parole Application of Trantino, 89 N.J. 347, 371-76 (1982); State v. Lavelle, 54 N.J. 315 (1969). See also Note, Victim Restitution In the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 946 (1984). In short, the very different ends served by the criminal justice system and the civil system substantially distinguish criminal restitution from the civil judgment collection mechanisms which are the aim of ERISA's anti-alienation provision. The goal of ERISA is to protect the "spendthrift" pension beneficiary from squandering his pension by outspending his benefits, and suffering assignment of those benefits to creditors. It is not to eliminate a legitimate sentencing tool of the state criminal court. Moreover, given the nature of a restitution determination under N.J.S.A. 2C:44-2 (that it must be in amount defendant can reasonably afford, State v. Rhoda, 206 N.J. Super. 584, 591-92 (App. Div.), certif. denied, 105 N.J. 524 (1986)); State v. Paladino, supra, 203 N.J. Super. at 547, the use of pension benefits to satisfy restitution will not result in the

pauperization of defendant or his dependents and thus will not offend the salutary principles of ERISA.

We note further that 29 U.S.C.A. Section (b)(4) exempts "generally applicable criminal law[s] of a [s]tate" from ERISA's broad preemption provisions. This statute has been interpreted fairly frequently. Most recently in State v. Burten, 219 N.J. Super. 156 (App. Div. 1987), we affirmed the Law Division opinion, 219 N.J. Super. 339 (Law Div. 1986), which held that a criminal law which "relates to" an employee benefit plan is preempted. The Law Division explained:

> In order to avoid being preempted, a state law, in addition to being an exercise of traditional police powers, must also affect the plan "in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." The New Jersey Statute at issue is not an indirect attempt to regulate employee benefits but directly seeks to impose penal sanctions for failure by the employer to contribute to an employee benefit plan that is established as a result of collective bargaining. [State v. Burten, supra, 219 N.J. Super. at 347 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524, 101 S. Ct. 1895, 1907 68 L.Ed. 2d 402, 417 (1981)].

We here reaffirm the distinction made in Burten and thus join the majority of jurisdictions which have read the preemption

exception in section 1144(b)(4) to mean that a criminal law is preempted where it "relates to" an employee benefit plan, while general criminal laws, such as those which punish larceny and theft, survive ERISA even where the subject of the theft is a pension plan or provider. Commonwealth v. Frederico, 383 Mass. 485, 419 N.E.2d 1374, 1378 (1981); Sforza v. Kenco Constructional Contracting Inc., 674 F. Supp. 1493, 1494-96 (D. Conn. 1986); Cairv v. Superior Court, 192 Cal. App. 3d 840, 845, 237 Cal. Rptr. 715, 718 (Cal. Ct. Appl 1987). In our view, the restitution provision of N.J.S.A. 2C:44-2 is a generally applicable criminal law and does not "relate to" an employee benefit plan; thus, it is not preempted by ERISA. Accordingly, the trial judge was free, within the constraints of N.J.S.A. 2C:44-2, to look to Pulasty's pensions for satisfaction of the restitution order.

Our ruling here makes it unnecessary for us to address Pulasty's alternate claim as to his Social Security benefits. The judge's original intention was that Pulasty pay restitution out of his pension; a scheme which we have held conforms with ERISA. Under the circumstances, there is no need for us to consider the anti-alienation provision of the Social Security Act, 42 U.S.C.A. Section 407(a) which is more restrictive and thus presents a more complicated issue than the parallel ERISA clause.

Pulasty's remaining arguments do not warrant extended discussion. Suffice it to say that state and federal income limitations enacted to regulate the relationship between civil judgment creditors and debtors have no more application to the

entirely distinct field of criminal restitution than does the ERISA anti-alienation provision. Kornit v. Bd. of Educ. of Plainview-Old Bethpage Central School Dist., 534 F.Supp. 94, 95 (E.D.N.Y. 1981), aff'd o.b., 677 F.2d 13 (2d Cir. 1982). In our view, the trial judge correctly found that state and federal restraints on garnishment "do not limit the criminal restitution authority of this court or the collection of that restitution." Pulasty has failed to demonstrate any error in this conclusion. In light of these rulings, his claimed entitlement to a refund and to counsel fees must fail.

Affirmed.

APPENDIX D

STATE OF NEW JERSEY,

Complainant,

vs. DECISION

LOUIS PULASTY,

Defendant.

October 26, 1990
Newark, New Jersey

B E F O R E: HONORABLE R. BENJAMIN COHEN, J.S.C.

TRANSCRIPT ORDERED BY:

JOHN L. PRITCHARD, ESQ.
76 South Orange Avenue,
South Orange, New Jersey 07079

A P P E A R A N C E S: JONATHAN D. TCHACK, ESQ.
Assistant County Prosecutor,
Attorney for the State

JOHN L. PRITCHARD, ESQ.
Attorney for the Defendant

MARGUERITE M. KENNEDY, C.S.R., Official Court Reporter

THE COURT: All right, with regard to the application to amend the restitution order, I'm not going to recount the procedural history of this matter in great length, it's long and somewhat tortured, going all the way back to the entry of Mr. Pulasty's guilty plea on January 13, 1986.

But of importance here, there was, on May 16, 1988, my Order of Restitution that was entered in this matter. And the restitution said an amount of restitution after full and fair hearing as to the amount of the theft, the amount of money attributable to Mr. Pulasty and to his co-defendant, as to details as to Mr. Pulasty's financial situation, his assets, his liabilities, his income, his expenses, those of himself and his wife, all of which were heard, argued and taken into account in fixing not only the amount of restitution which was, as I recall, somewhere in the neighborhood of $450,000 attributable to Mr. Pulasty, but the manner in which the restitution was going to be paid.

And as I recall, I don't have the Order in front of me at the moment, but as I recall, there was Keogh plan that Mr. Pulasty had some approximately $95,000 or so thousand dollars in that was turned over in partial payment of restitution. There was ordered that Pulasty's interest, which amounted to essentially a life estate, in the two homes that he owned jointly with his wife, be transferred to the Fireman's Fund as partial restitution, with the understanding that, of course, that in all likelihood would not amount to anything, but should Mr. Pulasty and his wife decide to sell either or both of those homes, then Mr. Pulasty's divided interest would be able to be partial payment of the restitution.

And then, finally, there was a periodic payment which is what's in dispute now, and I thank that was in Sub-Section 2F of the Restitution Order that provided that in the alternative Mr. Pulasty should either assign all of his rights in the Fireman's Pension Fund to the beneficiary of the restitution or in the alternative pay the amount of $531 per month. And that figure was set having taken into account, as I said, and having heard at hearings all of the assets, liabilities, expenses and income of Mr. Pulasty and his spouse, with whom he lives together.

Subsequently, there was an appeal taken from that restitution order and on September 25, 1989, the Appellate Division affirmed that Restitution Order and the Appellate Court indicated that pursuant to their earlier remand I had conducted an Evidentiary Hearing and at the conclusion thereof I had determined that the defendant was to make restitution in the total amount of $453,378.32.

I held that Mr. Pulasty was to be given a credit of $96,022.71, the balance remaining in his Keogh account, which was paid over to the Association in partial satisfaction. He was to be given a credit for $2,000 which he had paid pursuant to a prior Order of Restitution. He was directed to pay $28,890 to the Fireman's Association which represented an amount that he had transferred out of his Keogh account and into his wife's personal savings account.

He was directed to pay $15,000 to the Fireman's Association, which he had also transferred out of his Keogh

account to a trust account of his then attorney, Tchack, Occone, Tromodore and Offen (phonetic), for legal feels.

He was required to convey all of his right, title and interest in the Edison Berkely Township property that he owned as tenants by the entirety with his wife and he was directed to assign Fireman's Association all of his right to the $531 pension from the Fireman Fund and if that could not be accomplished, to pay $531 per month through the Essex County Probation Department until the balance of the restitution was discharged.

As Counsel are both aware, the pension was actually a slightly greater amount, $558 and charge per month. On appeal, the defendant contended that the Order of Restitution was improperly granted because it failed to take into account properly the financial ability and resources of the defendant and the appropriate payment of restitution. And the defendant argued on appeal that the arbitrary fixing of the amount of restitution violated his due process right by failing to properly apportion and determine the amounts that were attributable to Mr. Pulasty. The Appellate Court carefully considered those arguments and all of the arguments raised by the defendant and found that they were clearly without merit. They indicated, moreover, we are satisfied from our study of the record that there is a factual basis to support the Trial Court's determination as to restitution and there is no valid basis or sound reason for us to disturb that order.

Accordingly, they affirmed the restitution substantially for the reasons I expressed in my oral opinion of May 16, 1988.

Subsequently, July 19th of this year, 1990, the defendant filed this motion to amend the Restitution Order. We heard argument on September 28th and again today, October 26, 1990.

The facts here as follows:

On June 13, 1986, the defendant entered into a negotiated plea in which he agreed to make full restitution to the victims in an amount to be agreed upon between him and the State, or if that could not be agreed upon, in an amount to be fixed by the Court, after hearing. The defendant got the benefit of limiting his sentence exposure by that plea agreement.

Since the time of the plea, the defendant has done everything within his power to avoid paying restitution. He contested the amount of the restitution, as was his perfect right, and denied responsibility at the hearing for the payment of much, if not all, of the restitution. He, of course, pursued his appeals, as again was his right to do. After the first Restitution Order was entered in May 20, 1986, and while this matter was being litigated on appeal, the defendant made at least four unauthorized withdrawals from his Keogh accounts between June 23, 1986 and August 11, 1987 to the alleged sum of $53,990. Ultimately, much of that money was placed in his wife's savings account. Some of it was paid to a lawyer for legal fees and ultimately, those matters were dealt with by later Orders of Restitution.

On February 12, 1988, the defendant, of his own accord and under no compulsion, requested that $200 a month be withheld from his $538 a month Firemen's Pension Fund check.

He filed a W-r form with the check indicating that this was to be withheld for Federal income tax purposes.

On January 1, 1990, he again unilaterally requested that this amount be increased to $250 a month withholding for Federal income tax purposes.

On May 2, 1990, he unilaterally requested that $10 a month be withheld from the Fund pension check for State income tax purposes, effectively reducing his check and thereby, he thought, his restitution by first $200 a month and then $260 a month. He did this in years when he had no taxable income, '88 and '89, and when he had no Federal income tax liability, and was under no obligation whatsoever to have those amounts or for that matter, any amounts withheld from his pension check.

The issue of restitution here has been thoroughly litigated at the trial and appellate levels. I'm not going to reiterate all of the factors that went into my finding the amount of restitution and the type of restitution, other than to incorporate by reference to what was said by me at the time and the findings I made and the conclusions I drew following those hearings.

But we had a hearing on May 16, 1986 and ultimately on May 20, 1986 I entered an Order of Restitution. Following the June 19, 1987 remand from the Appellate Division and following several written submissions by both the State and the Defense, we had another restitution hearing on December 4, 1987. That was followed by additional written submissions by the State and the Defense and ultimately on May 6, 1988, I made my ruling on

restitution. I entered my Order and I incorporate everything I said at that time by reference into my remarks here today.

That decision was affirmed by the Appellate Division and they used the language I indicated. Thus, this Court and the Appellate Courts of this State have considered the loss of the victims required by our law, New Jersey State 2C:433H. We've considered the pecuniary gain to the defendant as required by 2C:44-2(A)(1). Considered also, has been deterrence of this type of offense involved and correction of the defendant as authorized and directed by 2C:44-2A(2). Also considered has been the ability of the defendant to pay restitution under 2C:44-2(B).

After lengthy hearings as to his come and expenses to the financial resources of the defendant, the nature of the burden restitution would impose upon him pursuant to 2C:44-2(C) and the time and method of payment of restitution under 2C:46-1.

As the result of defendant's actions since my May 6, 1988 Restitution Order in requesting and having withheld from his pension checks and in not paying those amounts to the beneficiary of the Restitution Order, the result has been that from June of '88 until this month, October, 1990, a total of 29 months, my Order provided for restitution in the amount of $531 a month. $15,399 should have been paid. The amounts actually paid, is reported by the Probation Department total, during that period, $9,864.83, the difference being $5,534.17 which has not been paid during that period, which I consider the defendant to be in arrears on. I'll pass on the question of whether I feel that action by the defendant is contemptuous or willful for the moment.

I make the following conclusions of law:

I've considered the arguments made by Counsel in their briefs, in their supplemental briefs, at oral argument last month and here today. The first issue raised is whether our State statutes dealing with Civil Collection Remedies, specifically New Jersey Statute 2A:50 Et. Sec., limits the power of this Court to set the amount of restitution and to enforce payment of restitution in this criminal manner. I do not think that those civil collection statutes in any way limit the power of this Court to set the amount of restitution or to enforce payment of restitution.

I listened carefully to the defendant's argument that this Court is limited by the statute dealing with Civil Collection Remedies, but I find that argument is supported neither by precedent or any sound policy considerations. No one can point to a signal reported decision in any court in this jurisdiction that has ever held that criminal restitution is limited by the Civil Collection Remedies of 2:17-50, Et. Sec.

2A:17-50 Et. Sec. deals with wage executions on income over $48 a week and 56 sets the amount of wage execution and says it shall not exceed ten percent unless the income of the debtor shall exceed $7,500 a year, in which case a court may order a larger percentage.

If policies underlying Civil Collection statutes include safeguarding a reasonable sum for the subsistence of a debtor and his family presumably from the hands of creditors, statutes providing for criminal restitution in our Criminal Code of Justice specifically, 2C:43-33, 2C:42-2, 2C:46-1 et. sec., evidence a

legislative determination that criminal restitution is part of a comprehensive statutory scheme for sentencing of certain defendants who have been convicted of crimes. These sentencing provisions are to be read in pari materia (phonetic) with all other statutes in dealing with sentencing of criminal defendants.. Among the many considerations which these statutes require a court is to consider in imposing restitution, the factors of deterrence of the type of offense involved and correction of the offender. Our statute, 2C:44-2(A)(2) makes that explicit. Clearly there are many different policies and considerations that pertain to criminal restitution as opposed to the collection of a civil judgment by execution or by garnishment.

Moreover, as I indicated earlier, the legislature enacted a comprehensive statutory scheme regarding criminal restitution. the legislature directed standards for the imposition of restitution. I am required to look at the loss to the victim, the pecuniary gain by the defendant, the ability of the defendant to pay, deterrence of the type of offense involved, correction of the defendant, financial resources of the defendant and the nature of the burden that restitution will impose upon him and the time and method of payment as well as enforcement of the Restitution Order.

Now, defendant's reading of the legislative intent, in my opinion, would substantially impair the power of a criminal sentencing court in its ability to deter the type of events involved and to correct the offender. In my opinion it would be a somewhat absurd result if a thief could steal all the money he could, secure in the knowledge that the Court's ability to make

him repay the victim was limited to ten percent of his annual income thereafter. That's simply an absurd result. The victim of a crime stands in different shoes from a civil judgment creditor, in this Court's opinion. I don't find that the legislature in enacting these criminal statutes, imposed any limitations on criminal restitution, similar to those imposed in the civil execution setting. When the legislature enacted these criminal restitution statutes, this scheme for sentencing, the legislature is presumed, under rules of statutory construction, to have been aware of the existing law regarding civil executions, which had been on the books for decades. And if the legislature had intended civil execution statutes to limit the criminal restitution concept, the legislature would have said so. The legislature did not. They certainly were aware of these civil statutes because they did refer to them in the criminal restitution context. And they indicated that upon default in the payment of restitution execution and civil remedied may be resorted to as one tool of enforcement, among a whole panoply of tools. So it cannot be again said that the legislature forgot about or wasn't aware of the civil remedies. They clearly were aware of the civil remedies and in no way, shape or form indicated any intent to limit the criminal restitution statutes by these State statutory civil remedies. Clearly, by the way, civil execution is not the only remedy, even on default in a payment in restitution, for example, where a failure to pay restitution is found to be fitrable. That failure shall be deemed to be contumacious and, of course, the power of the Court to punish for contempt including

imposition of a term of incarceration is made express in our Criminal Restitution Statutes.

So I do not find for those reasons that the State Civil Collection Remedies in 2A:17-50 et. sec. in any way limit the power of this Court in imposing restitution.

I'm not persuaded with this argument either, many of the same policy arguments apply. I have not been cited to even a single Federal case or any case anywhere for that matter, in which the Civil Federal Collection Statutes, the restrictions on garnishment contained in 15 U.S.C.A. Section 1671 through 77 have ever been applied to limit a criminal restitution matter on the State or Federal level. These statutes, 15 U.S. Code 1671 and 1677 were enacted based upon express public policy that's set forth in those statutes and that policy indicates that the unrestricted garnishment of compensation due to personal services, encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in Interstate Commerce. The policy is clear then, the Congress that underlies the limitations or restrictions on garnishment to protect debtors from predatory extensions of credit and to safeguard the predator and presumably the defendants to a certain extent. These policies are very different, are far different, as we know, from the policies that are implicated in criminal sentencing. And specifically restitution. The notions are simply vastly different. The traditional sentencing notions of deterrence, rehabilitation or correction of the offender are in many ways at odds with the

limitations that would be imposed were these Civil Collection remedies to be read as limiting the restitution concept. There are numerous cases, I'm not going to cite them all here, that lend support to my conclusion that the Federal Civil Collection Remedies do not limit the criminal restitution authority of this Court of the collection of that restitution.

Third, the defendant argues that the Federal Statute 29 U.S. Code, specifically the anti-alienation provision 29 U.S. Code Section 1056 (D)(1) prohibits the assignment of the pension here to Mr. Pulasty.

Here I think the defendant has hit upon an argument that has some merit. In this situation it cannot be again said that the defendant's pension falls within ERISA (phonetic), although no one has argued that, no one has objected to it either, but it's clear that this is a pension that falls within the protections of ERISA and the statute which prohibits alienation or assignment of a pension plan has been construed, in my opinion, quite broadly. There was a conflict among the Federal circuit, some circuit courts were ruling that there should be some equitable exception to this prohibition, other circuits disagreed and said there should not and the Supreme Court ultimately, in an attempt to resolve this conflict, heard the Guidry case, that's G-u-i-d-r-y v. Sheet Metal Workers National Pension Fund, which is reported at 110 Supreme Court page 680, a 1990 decision. And in that case the Court, while it was construing a -- it was in the context of a civil matter and it was construing the case in that light, nevertheless had occasion to refer to criminal matters as well. And the Court

did not feel that any generalized equitable exception, either for employee malfeasance or criminal misconduct to ERISA's assignment or alienation of pensions was appropriate. They read the anti-alienation provision of the ERISA statute in, I will not say absolute terms, but they recognize certain exceptions for non-support, family non-support and one or two other matters like that. But the Court said, as a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.

Obviously Justice McMahon (phonetic) was wrestling with this issue because he recognized that understandably there may be a natural distaste for the result we reach here. This statute, however, is clear.

In addition, as noted above, the malefactor often is not the only beneficiary of the pension. Well, frankly, I wonder about the wisdom of that decision, but it's a decision by the United States Supreme Court, the highest court of the land, and it's binding upon all. And although it was in the civil context, I think barely read, it seems to be applicable here, even though there is no decision exactly on point dealing with a Federal or State criminal restitution matter at the United States Supreme Court level or at the Supreme Court of New Jersey level. I think, in fairness, that signifies a determination that even in the criminal restitution context, that we have here, the pension rights themselves may not be alienated. The Supreme Court was careful to note that might not be the case where you had someone who was actually stealing from the pension fund itself, because

they indicated that I'll quote, "We need not decide whether the remedial provisions contained in Section 409A supersede the bar on alienation in Section 206D1 since petitioner has not been found to have reached any fiduciary to the pension."

In other words, had the defendant in that case or had the party in that case stolen from the pension fund itself the Court might have looked at it a little differently. But he stole from the Union, which is tantamount to our situation here. Mr. Pulasty stole from the Firemen's Association, not from the Firemen's Pension Fund itself. Had he stolen from the Pension Fund itself, I think the situation might be a little different. But I'm constrained to conclude, and this state as much as concedes that the portion of the Order of Restitution directing that Mr. Pulasty assign his pension rights to be fund, now that Guidry has answered the dispute here, ought to be modified. And I'm prepared to do so. I do not think that fully answers the question or questions that are raised here, but I think that prudence, if nothing else, would suggest that I consider the words of the Supreme Court in the Guidry case in amending the restitution Order that I entered back in 1988.

For the reasons I've indicated, and based on the findings of fact that I've made and the conclusions of law I've set forth here, just to briefly summarize, I did not find that either the State or Federal Civil Collection Statutes, enumerated in any way, limit the authority of this Court to set the restitution or enforce the collection. I do feel that in light of the argument that's been made here on the ERISA statute and in light of the Supreme Court's

decision in the Guidry case, that I ought to amend my Restitution Order accordingly.

However, I listened to the Prosecutor's argument about what effect this should have ultimately on the Order of Restitution and I listened, of course, to the response from Mr. Pritchard on that issue, as well, and it's not something that I haven't thought about on my own, either. I want to point out that the Order of Restitution that I set in this matter is only partially implicated here. We're only dealing in this application, in the motion to amend, with one part of an overall order. The overall order, as I indicated, provided for setting up an overall amount of restitution, the payment of certain monies in the Keogh plan, the repayment of other monies that had been taken out of that Keogh plan, the credit of some other monies already paid, the $2,000 payment Mr. Pulasty already paid, the assignment of his interest in some real estate and a monthly payment to ultimately make up the balance, which monthly payment was written in the alternative, either assignment of the pension rights or the payment of $531 a month. And as I've already indicated this Restitution Order was fixed after full and fair hearing at great length on several dates and following several written and oral submissions, the taking of testimony and my consideration of all of the evidence that had been offered.

While I feel that in fairness to the defendant the Court, I now agree that I should not order the assignment of pension rights, I think that may very well run afoul of the ERISA anti-alienation provision as interpreted by the United States Supreme

Court. Nevertheless, I see nothing to prohibit this Court in taking into account the amount of that monthly income to the defendant, along with his other monthly income. And there was and is other monthly income from another pension, from social security benefits, as well as social security benefits to his wife. I take, as I did back on May 6, 1988, all of those things into account in setting the amount of restitution here and I'm not persuaded to amend that amount or to delete anything from that amount. The amount I said was $531 a month at that time. I'm not persuaded to amend that in any way other than to delete the portion of the order that requires assignment of pension rights which, of course, was not done in any event. I note, in passing, that the pension actually amounts to and has amounted to $558 a month, not $531 a month. Nor am I inclined to increase the amount of the Restitution Order.

With regard to what's happened since my last Order, as I think I've indicated, in my opinion what Mr. Pulasty has done may very well be contemptuous or contumacious. He himself has chosen to avoid paying $200 a month and then $250 and $260 a month by having this amount withheld for income taxes that he knows he doesn't owe. He's an accountant, he knows full well and knew back then what he was doing. And I'm satisfied that he did this with full knowledge of what he was doing, number one.

Number two, even attributing or without attributing any of that knowledge or any of those motives to Mr. Pulasty, he simply hasn't complied with a clear Order of Restitution. Neither he nor with all due respect to the Probation Department or the

Firemen's Fund, none of those parties has the power to modify or amend a court order entered by me. I'm the only one or an Appellate Court is the only one who can modify that Order. And, you know, I don't think there was any agreement between anybody, but even if there was, that agreement is of absolutely no effect whatsoever. The facts, the undisputed facts are that Mr. Pulasty has paid $9,864.83 since my Order of Restitution, when the Order clearly provides that he should have paid an additional $5,534.17. I find that he is in arrears as to that amount.

While I'm reluctant to institute contempt proceedings against Mr. Pulasty, it's not something I would like to do, although part of me says that that's exactly what I should do, what I'm going to do is as follows:

I'm going to set that amount as arrears. I'm going to direct that amount, that full amount, $5,534.17, is to be paid by way of restitution through the Probation Department no later than 90 days from today's date, which is January 24, 1991.

In addition, to the $531 per month, that will continue to be part of the Restitution Order. If the money is not paid for any reason by that date, then I'm going to consider instituting or signing an Order to Show Cause why Mr. Pulasty should not be held in contempt and I'll refer the case out to another judge for hearing on that. I don't want to have to reach that situation and I only do that in an attempt to hopefully resolve that matter so that we don't have to reach that juncture.

I will enter an Order amending my Order of Restitution and deleting from it the assignment of the pension rights, but

leaving the other prong of Section 2F of the Order in effect, that there is to be payment of $531 a month, that's to continue.

I will also fix the arrears as of today's date at $5,534.17 and direct that arrears amount he paid through the Probation Department by no later than 90 days from today's date or that is on January 24, 1991.

Do either Counsel have anything they want to add or place on the record before we adjourn?

MR. PRITCHARD: Yes, your Honor.

THE COURT : Yes?

MR. PRITCHARD: I will have to check with my client, but to my knowledge he does not have this much money. Perhaps he could get money from a refund from the Internal Revenue Service, but could your Order at least be contingent upon him being able to get such a refund?

THE COURT: I'm not making the Order contingent on anything. I'm giving him 90 days to make that payment or else I'm going to consider taking the action I've indicated.

MR. PRITCHARD: With all due respect, would that have to be contingent upon once we get to January 24, 1991 on whether or not he ever has any power to come up with this amount of money?

THE COURT: Well, frankly, Counsel, I'm frankly sure that Mr. Pulasty has the power to come up with this money. He seem to have the power to come up with the money to pay attorneys, he has the power to do a lot of things. He has the power to do everything except pay restitution. I have no doubt

that Mr. Pulasty has the power within 90 days to make that payment. If he doesn't, then the consequences I've indicated. All right.

All right, thank you.

MR. TCHACK: Thank you, Judge.

(Whereupon the proceedings were concluded.)

3997-APD

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
INDICTMENT NO. 1390-4-B5
APPELLATE NO 00328090-T1

STATE OF NEW JERSEY,

Complainant,

TRANSCRIPT OF PROCEEDINGS

vs.

MOTION

LOUIS PULASTY,

Defendant.

February 1st, 1991
Newark, New Jersey

BEFORE: HONORABLE R. BENJAMIN COHEN, J.S.C.

TRANSCRIPT ORDERED BY:
MARTHA A. SUHAYDA-VOGT, ESQ.

APPEARANCES: JONATHAN TCHACK, ESQ.
Assistant Prosecutor
Attorney for the State

MARTHA A. SUHAYDA-VOGT, ESQ.
Attorney for the Defendant

LOREN BAZZANI, C.S.R. 1272
Official Court Reporter
710 Essex County Courts Building
Newark, New Jersey 07102

[Argument of Counsel deleted]

THE COURT: We had another hearing and I made an order on that. I did modify it somewhat, affirm other parts of it, that's presently on appeal before the Appellate Division right as we sit here.

This is the defendant's motion to withdraw his guilty plea, guilty plea was entered in January of 1986, January the 13th, 1986, to the second degree theft by deception on which I subsequently sentenced Mr. Pulasty to five years State Prison and to make full restitution.

Mr. Pulasty served his sentence, was released on parole and his parole term has expired and he's no longer on parole. The only remaining aspect of his sentence is the continuing periodic payments pursuant to the restitution order.

Now, five years later, he seeks to withdraw his guilty plea and proceed to trial.

Our court rules, Rule 3:21-1 governs the withdrawal of guilty pleas and the effect of the rule is quite simple. A motion to withdraw a guilty plea shall be made before sentencing but the Court may permit it to be made thereafter to correct a manifest injustice and our case law indicates consideration of the Court's review in deciding how to exercise its discretion in deciding whether this remedy is necessary to correct a manifest injustice.

Our Supreme Court indicated in decisions going back over twenty-five years ago as follows:

"In exercising its discretion the Court must fairly and justly weigh the policy considerations which favor the finality of judicial procedures against the policy considerations which dictate that no mean be deprived of his life or liberty except upon conviction after a fair trial or after the entry of a plea of guilty or its equivalent under the circumstances which evidence that it was made truthfully, voluntarily and understandingly."

Quite obviously that is the balance that has to be made. The policy in favor of the finality of the judicial procedures on the one hand and the rights of the defendant in this case who enters a plea of guilty to make sure that it was done fairly and that's essentially whether the plea was truthful, voluntarily done and with understanding.

Here, as the Prosecutor has somewhat alluded to, I do have a little bit of an advantage over Counsel for Pulasty in the sense that I was there at the time the plea was entered and I have been there for the last five years while this case has proceeded in Court and through the Appellate Courts.

At the time of the taking of the plea I had the opportunity to observe the demeanor and assess the credibility of Louis Pulasty which, of course, the cold record of plea transcript is lacking.

I am also familiar with his then trial attorney, Michael Dalessio, I agree with the Prosecutor, Mr. Dalessio is an experienced and competent criminal defense attorney, a competent trial lawyer.

At the time the plea was entered I questioned Mr. Pulasty at great length, at much greater length than I ordinarily do when taking a plea because of the nature of this matter. Mr. Pulasty is no an unsophisticated or uneducated individual. I observed him and it was quite clear to me that he full well understood what was going on and he full well understood what he was pleading guilty to. He full well understood the consequences of his plea, his options with regard to that and everything that was going on around him.

I find his motion recently submitted, affidavits that are made in support of this motion now to withdraw his guilty plea frankly to be one of the most outrageous documents I have seen in my nearly ten years on the Bench.

Mr. Pulasty now asserts that essentially he was lying in virtually every answer that he gave to the Court when he entered his plea, he has the incredible nerve also to assert that his then trial lawyer coerced him, misled him and cajoled him into entering a plea of guilty which he says he didn't know what was going on and he didn't understand the consequences and he really

didn't want to do this and moreover that none of it was true, that he never did any of these things.

Unfortunately, my experience with Mr. Pulasty over the last five years is such that I must confess I have an extremely low opinion of his credibility. Mr. Pulasty is a consummate liar. I have observed it in the courtroom, I have observed it in the pleadings that he has submitted, I have observed it through his actions that he's taken over the course of five years.

The Prosecutor alluded to just a few other things he's done leading up to this crime and subsequent thereto for him to assert that he stood here in this courtroom and was being kicked under the table by his lawyer is a bold-faced lie. I was sitting right here, I watched him enter the plea, I can see under the table just as I can see under the table right now as I look at Counsel. Mr. Dalessio was not kicking Mr. Pulasty under the table nor was he feeding him any answers nor was he cajoling him into entering a plea of guilty that was untrue.

Mr. Pulasty, as distasteful as it might have been to him, had to confess what he did. Even the time, as his plea transcript bears out, even at that time after he admitted his guilt obviously to his own lawyer, to the Prosecutor, it tuck in his craw to have it come out in the courtroom and for him to say what he did and it wasn't until I insisted that I wanted to hear what he did--and I read it before, I told him "I'm not going to let you plead guilty to something you didn't do, I am not going to let you plead guilty to a crime you didn't commit. Our law doesn't permit that."

And then knowing that he indicated clearly and unequivocally what he did and he knew it was wrong and that he understood it and this was after he had a whole series of questions from me indicated that he understood what was going on, for example, at the time of the plea I asked him, top of page four, whether his lawyer, Mr. Dalessio, had explained to him what the charges in the indictment were, he answered "Yes."

I asked him, "You understand those charges?" He said "Yes, I do."

I show him the two forms that I was then using in taking guilty pleas, the one commonly known as an LR-27 and the other a summary of defendant's right form and I asked him if Mr. Dalessio had gone over these forms and explained to him everything that was on them including all of his rights. He said "Yes, Mr. Dalessio had."

I asked him did he explain all of your rights that are contained on these plea forms and the defendant answered that, yes, he did.

I asked him if he understood those rights and he said yes, he did.

I asked him if he understood that by pleading guilty here today he was going to be giving up or waiving some of these rights, he wouldn't have them anymore and he answered that he understood and then to further explain and make sure that he understood I said:

"For example, without going through all of the rights contained on these forms, just to make sure you understand, do

you understand that if you plead guilty you will giving up, amongst other things, the right to have a trial by a jury in a Court in this matter?"

He answered, "I understand that."

I further go on--and I will quote:

"THE COURT: Do you understand if you were going to trial you would be presumed to be innocent until the State can prove you guilty beyond a reasonable doubt?

Do you understand you are giving up that right as well?"

"THE DEFENDANT: Right."

"THE COURT: Do you understand you will be giving up the right to be represented by an attorney at trial, to have your lawyer cross-examine any witnesses called against you, you would be giving up the right to, I believe, call witnesses?"

"THE DEFENDANT: Yes."

"THE COURT: Did you sign these forms, the plea from and the summary of defendant's rights form voluntarily and of your own free will?"

"THE DEFENDANT: Yes, I did."

"THE COURT: Mr. Pulasty, you have Mr. Michael Dalessio as your lawyer?"

"THE DEFENDANT: Yes."

"THE COURT: Have you had enough time to talk this case over with him before coming into Court today?"

"THE DEFENDANT: Yes, sir."

"THE COURT: Has he answered all of your questions to your satisfaction?"

"THE DEFENDANT: Yes, sir."

"THE COURT: Are you satisfied with Mr. Dalessio as your lawyer in this matter."

"THE DEFENDANT: Yes."

He then went into the factual basis, the plea, he indicated chapter and verse, if you will, what he had done wrong and I asked him, I made sure he understood the terms of the plea agreement, I asked him that if he entered this plea of guilty to a second degree crime, that I could sentence him up to ten years in prison and up to a $100,000 fine and that restitution as well was part of the plea agreement?

He indicated that he understood that.

I told him about the Prosecutor was recommending no more than five years in prison but I could still give him up to ten although if I was going to give him any more than the five I would first give him the option to withdraw his plea and he said he understood.

He indicated his age, 70, and a half years of age, he indicated he could read and write the English language.

As I said, he gave a factual basis. He gave more than adequate factual basis for the plea. I find that his plea was a knowing, intelligent and voluntary plea of guilty and I indicated that I understood that was satisfied that Mr. Pulasty understood what he was charged with and the nature and the elements of the crimes and I stated I was satisfied that he established a sufficient factual basis to sustain the truth of the charges to which he was pleading guilty of. I accepted the plea.

The defendant, five years later, for the first time comes into Court and says all of that was a lie. Not only didn't he know what was going on but he never did any of those crimes.

My recollection, although I was not privy to the full discovery as the Prosecutor and Defense Counsel were back then, as apparently you are today, Counsel, all of the voluminous discovery was not presented to me but it was readily apparent form what had been disclosed to me by the Defense at the taking of the plea and by the Prosecutor at that time Mr. Tchack, that the State's case against Mr. Pulasty was not a weak case. The State had a fairly overwhelming case against Mr. Pulasty and his co-defendant, Ms. Fourtney, who also entered a plea of guilty and also inculpated her and Mr. Pulasty by the way.

Mr. Pulasty knew what he was doing and he made a deal with the State, the best deal he could and I am satisfied today every bit as I was then that his plea was entered knowingly and intelligently, and voluntarily and with the advice of competent Counsel.

The argument is that Mr. Dalessio was incompetent, I also find rather remarkable and startling. I might add that the defendant has been represented over the years by a large number of different Counsel at different proceedings before me.

Before Mr. Dalessio there was Mr. Querques, I believe, and Mr. Dalessio I know it was Mr. Pritcher and now present Counsel. I may be leaving one or two out, I am not certain. That is just the Counsel that appeared on the criminal matter. There

were other Counsel who appeared along with them, maybe they were tax attorneys, I am not sure.

Never until this time with all those and I might add, all of his Counsel have been competent attorneys, never until the present time has anyone asserted either that the plea was not a knowing, intelligent or voluntary plea, that Mr. Dalessio was anything less than competent. It's hard for me to imagine that if all of this was a lie Dalessio didn't know it and he didn't realize it. If it truly was a lie it would not have taken him five years to come in here and say "I want to withdraw my plea."

He didn't do it any time up until the time of sentence and certainly thereafter. It hasn't been because he didn't know where this courtroom is, he's been back here with great regularity on any number of applications.

The standard for incompetence of Counsel set forth in the Strickland v. Washington case and following in this jurisdiction in State v. Fritz, indicates that a criminal defendant is entitled to the assistance of a reasonably competent Counsel.

If Counsel's performance has been so deficient as to create a reasonable probability that those deficiencies materially contributed to the conviction, the defendant's Constitutional rights have been violated.

Well, I don't thin Mr. Pulasty has come close to meeting any of those prongs of the test here.

First of all, there is no showing whatsoever that Mr. Dalessio's representation fall below the standard of a reasonably competent attorney. Objectively look at the matter. He

represented in a competent fashion, he negotiated a plea which limited Mr. Pulasty's exposure, he plead guilty to one count, he got the Prosecutor to recommend that he be sentenced at the low end of the range for a second degree crime, the crime being five to ten years, he got the Prosecutor to recommend no more than five years on a substantial fraud type of case where the theft was in the thousands of dollars, in fact, over a million dollars in total.

He got the Prosecutor to dismiss numerous other counts.

I think he represented him--Mr. Pulasty quite admirably in that sense.

With regard to the allegation that Mr. Pulasty now makes for the first time abut Mr. Dalessio, I indicate (1) they simply are not true. I observed the taking of the plea in the courtroom and I can say with a degree of 100 % confidence that Mr. Dalessio was not kicking Mr. Pulasty under the table. He was not twisting his arm in any way, shape or form, that Mr. Pulasty knew what he was doing, he handled his plea with full understanding of what he was doing and the consequences. He admitted his guilt--I am going to say freely and voluntarily although the end result is that it may not have been so freely and voluntarily but he understood that he had to admit what he was doing, that he had to admit his guilt albeit very hard for him, so I am satisfied that the standard for incompetence of counsel has not been met.

There's nothing in the representation of Mr. Pulasty that would lead me to think that there was a manifest injustice here. In short, I am satisfied that the plea was entered most importantly

truthfully, it was true, but of secondary importance it was voluntarily entered and it was done with understanding.

Against that backdrop, then, I don't find anything on that balance of the scale to outweigh the policy of finality of judicial procedures.

Frankly, I am not aware of any case in this jurisdiction or for that matter any jurisdiction that has been brought to my attention where a motion to withdraw a guilty plea has been made and granted not only at the sentence date, not only after the defendant has begun to serve his term, but after he completed serving his term, completed his period of parole and the only remaining aspect of this sentence is a continuing order of restitution and that is only because he wasn't able to make the payment in a lump sum.

I think the finality of judicial procedures or the policy that favors it in considerations that weigh in favor of it clearly out balance the countervailing factors so for all of those reasons I am going to deny the motion to allow Mr. Pulasty to withdraw his guilty plea.

MR. TCHACK: Will you sign an order right now?

THE COURT: I will have to have my Clerk prepare an Order and I will send it to both of you.

MS. SUHAYDA-VOGT: I think I might have an order, it might save you time. It might be at the end of the notice of motion.

THE COURT: Yes.

(Whereupon the proceedings are concluded.)

3997-APE

APPENDIX F

AFFIDAVIT OF LOUIS PULASTY, DATED DECEMBER 18, 1990 (SUBMITTED IN SUPPORT OF DEFENDANT'S JANUARY 9, 1990 MOTION TO WITHDRAW GUILTY PLEA)

MARTHA A. SUHAYDA-VOGT, ESQ.
142 Highway 34, Suite 350A
Holmdel, New Jersey
(201) 946-0900
Attorney for Defendant

SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY, ESSEX COUNTY - CRIMINAL

Plaintiff, INDICTMENT NO. 1390-4-85

vs. AFFIDAVIT OF LOUIS PULASTY

LOUIS PULASTY,

Defendant.

LOUIS PULASTY, being of full age, swears upon his oath as follows:

1. I am the Defendant in this action and am fully familiar with the facts herein. This Affidavit is made in support of my motion to permit withdrawal of my guilty plea.

2. In 1985, I was indicted on 26 counts, including conspiracy, theft by deception, misapplication of entrusted funds and forgery. On January 13, 1986, I plead guilty to one count of second degree theft by deception (Count Two of Indictment) on the advice of my attorney at the time, Michael D'Alessio, Jr. I had no idea that there was even a chance of a jail term at the time. To my horror, at my sentencing, I was sent to jail for five (5) years, served 14 months of my term and was released on or about May 1, 1987.

3. It is my vehement belief to this day that my plea was not made voluntarily and knowingly, that there was an inadequate factual basis for my plea, that I had ineffective counsel and that the amount of my restitution is grossly erroneous. This Affidavit will set forth as succinctly as possible the facts underlying my position.

4. I have been a CPA and an Enrolled Agent with the Internal Revenue Service for approximately 50 years and was appointed Treasurer of the New Jersey State Fireman's Association (N.J.S.F.A.) sometime in 1973. It was a part-time position.

5. When I first started as Treasurer, I immediately saw that the financial audit procedure was in disarray. It was my recommendation that a quarterly audit be done on a regular basis as a stopgap measure to catch any errors made on a daily or monthly basis in the office expense account. N.J.S.F.A. President, William Dugan (hereafter "Dugan") agreed with my recommendation and from that point forward the Finance

Committee conducted quarterly audits at the East Orange office's of N.J.S.F.A. The three men on the Committee had been appointed by Dugan. At first, the "audits" were done off-site at conventions and other meeting sites without records. It was at my recommendation that the audits began to be conducted at our main office where the ledgers, etc. were kept. I encouraged the audits because I never had anything to hide.

6. My responsibilities as Treasurer included the payment and posting of bills into a ledger on a daily basis and to summarize on a quarterly and annual basis. Pursuant to Dugan's instruction, no vouchers were issued and all venders were paid on invoices.

7. My co-defendant, Barbara Furtney, was the Coordinator of the N.J.S.F.A. She would give me the information needed for a particular check together with the invoices. I filled out the check stub once I reviewed the bill, dated the check and used my signature stamp on it. Barbara Furtney would then type the check and it would be sent out without my seeing it again. I also left her the entire check book so that if more bills needed to be paid in my absence, then Barbara Furtney would have the checks needed to pay them. It was she who used my signature stamp on those additional blank checks.

8. In early 1985, the Essex County Prosecutor apparently began to investigate allegations of embezzlement, etc., in our office. I was completely taken by surprise when I discovered that I was also under investigation.

9. I first contacted attorneys, Hannock & Weissman, but eventually retained Michael Querques. As the trial date approached, Mr. Querques informed me that he would be involved in a lengthy trial exactly at the time that my trial was scheduled. Judge Cohen, by letter, refused to grant an adjournment until May, 1986 when Mr. Querques would become available, set the trial date for January 2, 1986 and instructed me to seek new counsel.

10. This put me in a great panic. I had an excellent relationship with Mr. Querques and trusted him implicitly. Now I had to find new counsel. Eventually, I retained attorney Micheal D'Alessio in October, 1985. I only met with him on two or three occasions for a total of approximately five hours prior to entering the plea. At our first meeting he insisted that he would hire a top notch investigator and accountant to aid in my defense. To my knowledge, these experts were never hired much less consulted. There was never a thorough review of the allegedly illegal checks during our meetings.

11. Shortly before appearing in court on January 13, 1986, Mr. D'Alessio asked that I meet him at the courthouse on that date. I had no idea at the time that I would be pleading guilty that day.

12. Once we met in court, Mr. D'Alessio consulted with the prosecutor and indicated to me that it was his very strong recommendation that I plead guilty. We did not discuss the plea in detail, did not talk about the possibility of a jail sentence, did not review the merits of the case, the possibility of a successful

defense before a jury, or any of the other major issues which now, in hindsight, I realize that Mr. D'Alessio had the ethical and legal obligation to discuss with me before the plea.

13. Being completely oblivious to the consequences of my action, I entered the courtroom with Mr. D'Alessio with no preparation whatsoever and entered my plea. A copy of the transcript of that proceeding is attached as Exhibit A. My only thought at that time was that the case would finally come to an end if I answered "yes" to questions, even though I knew that I was innocent.

14. The Judge referred to a plea form which apparently I had signed but which I had never read or had explained to me. (Exhibit A, T-4, line 10). When the court asked Mr. D'Alessio whether I had read the forms, he signaled to me to say yes-which I did (Exhibit A, T-4, line 17). I was confused, petrified, intimidated and foolishly had blind faith in my attorney.

15. In the course of the plea hearing I continued to answer "Yes" to the Judge's questions in robot-like fashion, having no understanding of the procedure of which I was apparently an integral part.

16. The Judge asked me "Did you sign these forms today voluntarily, and of your own free will?" (Exhibit A, T-7, line 2). I answered "Yes", but only realized that the question had been asked and answered four years later when I read the transcript.

17. Later on the Judge inquired, "have you had enough time to talk this case over with him [Michael D'Alessio] before coming to court today?" (Exhibit A, T-7, line 13) and asked several other questions about Mr. D'Alessio's representation. I blindly and unknowingly answered "Yes" each time. In fact, when the Judge asked if I understood everything he had explained to me in the course of the proceeding, I answered "Yes, I do" (Exhibit A, T-12, lines 13-22) as a result of Michael D'Alessio kicking me under the table and shaking his head yes.

18. To fully understand the complete absence of any factual basis it is necessary to know that the prosecution's allegations fell into three categories: (1) personal expenses were paid from N.J.S.F.A. monies, (2) unauthorized expenses were paid, and (3) checks were written to vendors who did not exist or whose invoices were significantly less than that which was paid them. The total amount of money allegedly embezzled was $625,504.43.

19. Of all the hundreds and hundreds of checks written out over the 5 year period in question from 1978 to 1983 it is critical to know that (a) only $38,944.54 were actually written out to me, and (b) that I never personally endorsed the back of any check with my own handwritten signature the remaining $600,00 plus in checks. Those checks had my signature stamp on the endorsement line in all probability placed there by Barbara Furtney!

20. Again reviewing our interoffice procedure, invoices were presented to me by Barbara Furtney and I prepared

the check stubs. It was Barbara Furtney's job to check incoming mail, separate out invoices and present them to me with the checkbook for payment. I did not inquire as to whether an invoice was erroneous, completely fictitious, or whether a vendor was completely fictitious. I had no reason to. My role was not that of an office manager. Barbara Furtney dealt with the vendors and I had no reason to suspect any illegal act. In addition, President Dugan appointed her and had complete faith in her.

21. The $38,944.54 in checks made out to me were reimbursements for legitimate business expenses incurred by me in connection with the N.J.F.S.A. The expenses averaged out to approximately $7,500 per year. A handwritten list explaining the purpose of each check is attached as Exhibit B. It is obvious from the list that each check had a valid explanation.

22. My responses to Judge Cohen with regard to the factual basis for the plea are confusing and reflect my complete lack of understanding of what information the court was trying to elicit from me.

23, For example, the Judge asked "Among the other things you directed that checks be written out to people who did not exist?" I answered, "I would say so, yes." (Exhibit A, T-15, lines 9-12). However, then the following exchange took place (Exhibit A, T-15, lines 20-15, T-16, lines 1-3):

THE COURT: Well, wait a minute. How would a check -- who would direct or tell Ms. Furtney to write out a specific check to someone who did not exist? Did you ever do that?

THE DEFENDANT: No, Sir.

MR. D'ALESSIO: It was done with his knowledge, he did not direct the check.

24. After the criminal investigation began, I realized that Barbara Furtney had given me erroneous and fictitious invoices to legitimate, and sometimes fictitious vendors, and also checks made out to herself which in hindsight were not legitimate reimbursements. At the time I had no knowledge whatsoever that Barbara Furtney was doing this. YES, I did consent to a check being issued to pay for the invoices. NO, I did not inquire into the underlying bases for the invoices, etc., to see if they were legitimate – it was not my responsibility.

25. At the very least, my restitution should have been limited to the $38,845 of checks made out to myself. There was never any evidence from any objective source that I had in any way received a portion of the remaining $600,000 plus in allegedly embezzled funds. Other than my own checks, my true signature did not appear on a single one of all the other hundreds of checks submitted as evidence by the prosecution.

26. Most importantly, my lifestyle did not change one iota during this time period. My bank account deposits, spending

habits and other indica of my financial status stayed exactly the same.

27. I now ask the Court to permit me to withdraw my guilty plea and to contest my case on the merits I have already served my time and have repaid whatever debt I may have owed to society for my perhaps foolish, but not criminal, behavior. Until I consulted with my present attorney, after serving my prison term. I did not realize that I could even contest my guilty plea. Had I known, I would have done so long ago. I only ask for another chance to prove my case, this time with solid advice from a reliable and competent attorney.

/s/

Louis Pulasty

Subscribed and sworn to
before me this 18th day
of December, 1990.
/s/

Carole C. Wentzel
A Notary Public of New Jersey
My Commission Expires 10/17/94

3997-APF

APPENDIX G

AFFIDAVIT OF ANNA PULASTY, DATED DECEMBER 18, 1990 (SUBMITTED IN SUPPORT OF DEFENDANT'S JANUARY 9, 1990 MOTION TO WITHDRAW GUILTY PLEA)

MARTHA A. SUHAYDA-VOGT, ESQ.
142 Highway 34, Suite 350A
Holmdel, New Jersey
(201) 946-0900
Attorney for Defendant

SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY, ESSEX COUNTY - CRIMINAL

Plaintiff, INDICTMENT NO. 1390-4-85

vs. AFFIDAVIT OF ANNA PULASTY

LOUIS PULASTY,

Defendant.

ANNA PULASTY, being of full age, swears upon her oath as follows:

1. I am the wife of the defendant in this action and am fully familiar with the facts herein. This Affidavit is made in support of my husband's motion to permit withdrawal of his guilty plea.

2. I have been married to Louis Pulasty since January 14, 1939. This period encompassed the time frame

during which the criminal charges were brought against him in this matter, his subsequent guilty plea and jail term.

3. Since I lived under the same roof with my husband for many years prior to his indictment and conviction, and also during the time period of the alleged embezzlement, I can tell the Court honestly that our lifestyle did not change one bit during the year when these hundreds of thousands of dollars ere supposedly taken. I am aware of the monies deposited into the bank during that time frame. I was aware of my husband's spending habits during that time and also participated in the vacations we went on during those months and years. Our lifestyle remains the same both before and during this critical time when the alleged illegal acts took place.

4. There is absolutely no way that these tremendous sums of money could have come into our household without me knowing it.

5. I respectfully ask the Court to permit my husband withdraw his guilty plea so that his case can be tried on its merits before a jury.

/s/ Anna Pulasty

Subscribed and sworn to before
me this 18th day of
December, 1990.
/s/

Carole C. Wentzel
A Notary Public of New Jersey
My Commission Expires 10/19/94

APPENDIX H

CERTIFICATION OF ELAINE BENNETT, DATED JANUARY 23, 1990 (SUBMITTED IN SUPPORT OF DEFENDANT'S JANUARY 9, 1990 MOTION TO WITHDRAW GUILTY PLEA)

MARTHA A. SUHAYDA-VOGT, ESQ.
142 Highway 34, Suite 350A
Holmdel, New Jersey
(201) 946-0900
Attorney for Defendant

SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY, ESSEX COUNTY - CRIMINAL

Plaintiff, INDICTMENT NO. 1390-4-85

vs. CERTIFICATION OF ELAINE BENNETT

LOUIS PULASTY,

Defendant.

ELAINE BENNETT, being of full age, hereby certifies as follows:

1. I am the daughter of the defendant in this action and am fully familiar with the facts herein. This Affidavit is

made in support of my father's motion to permit withdrawal of his guilty plea.

2. I was very much involved in my father's legal defense in this criminal matter. When Judge Cohen had made the January trial date firm, and my father could no longer use attorney Michael Querques, I am the one who found attorney, Michael D'Alessio through an attorney directory.

3. My father initially met with Mr. D'Alessio alone, and it was shortly thereafter that my father indicated to me that he was concerned about Mr. D'Alessio's competency. I accompanied him on his last two meetings with his attorney. The total amount of time that my father spent with Mr. D'Alessio prior to his guilty plea was approximately five hours.

4. My mother was with my father when Mr. D'Alessio told him at their first meeting that he would hire a top notch investigator and an accountant to aid in his defense. As my father stated in his affidavit, these individuals were never hired and a thorough investigation was never conducted. In fact, any investigation in this matter was done by myself. I conducted extensive tape interviews with my father to jog his memory, to review the hundreds and hundreds of checks in this case and, in effect, to familiarize himself with the underlying facts. This was after he served his time.

5. I also accompanied my father to court on the day he plead guilty.

The plea was not discussed at all prior to my father testifying in front of Judge Cohen. There was some

discussion about the possibility of a jail sentence, no review of merits of the case, the possibility of a successful defense before a jury, or any of the other major issues in this case.

6. I sat there as the guilty plea was taken from my father by Judge Cohen. I noted that my father was very afraid and he was answering simply because he was intimidated both by Mr. D'Alessio and the Judge. This was not a voluntary and knowing guilty pea. My father was completely unaware of his rights or of the legal ramifications of his plea.

7. Accordingly, I strongly urge the Court to permit my father to withdraw his guilty plea so that he can contest this case on its merits before a jury.

8. I hereby certify that the statements made by me herein are true. If any of the statements made are willfully false, then I am aware that I am subject to punishment.

/s/ Elaine Bennett

Date: 1-23-91

3997-APH

APPENDIX I

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY - CRIMINAL
INDICTMENT NO. 1390-4-85

STATE OF NEW JERSEY,

Plaintiff,

vs. TRANSCRIPT OF PROCEEDINGS

LOUIS PULASTY,

Defendant.

January 13, 1986
Essex County Courthouse
Newark, New Jersey 07102

BEFORE: HONORABLE R. BENJAMIN COHEN, J.S.C.

APPEARANCES: JONATHAN D. TCHACK, ESQ.
ASSISTANT PROSECUTOR
For the State

MICHAEL D'ALESSIO, JR.,
ESQ.
Attorney for the Defendant

CARMEN M. LILOIA, C.S.R.,C.M. Official Court Reporter

THE CLERK: Indictment No. 1390-4 of the 1985 term, State vs. Louis Pulasty.

Will counsel please identify themselves for the record.

MR. TCHACK: Jonathan Tchack, Assistant Prosecutor, on behalf of the State.

MR. D'Alessio: Michael D'Alessio, Jr. for Mr. Pulasty.

THE COURT: Counsel, it's my understanding from discussions with counsel that there is a proposed plea of guilty to a portion of the indictment.

Mr. Tchack, would you please put your understanding of the terms of the plea agreement on the record and then I'll hear from Mr. D'Alessio.

MR. TCHACK: Yes, your honor. Thank you.

Your honor, pursuant to a plea disposition conference between the Prosecutor's Office and Mr. D'Alessio, it's my understanding that the defendant Louis Pulasty, will agree to retract his plea of not guilty to Indictment No. 1390-4 of the 1985 Term and enter a plea of guilty to Count Two of that indictment, which charges him with second degree theft by deception. In return for this guilty plea, your Honor, the State recommends that a custodial term not to exceed five years be imposed. The State also requires as part of this plea bargain, that full restitution be made with the overall dollar amount to be agreed upon by the State and the defendants in this case and if the parties cannot agree upon the dollar amount, then the total amount of restitution and the amount restitution for which each defendant will be responsible for, will be set by the Court. The

State also agrees to dismiss the remaining counts of the indictment in this matter and the State reserves the right to be heard at the time of sentencing.

THE COURT: All right.

Mr. D'Alessio, does that recitation comport with your understanding of the terms of the plea agreement?

MR. D'ALESSIO: Yes, it does.

THE COURT: All right.

You're Mr. Louis Pulasty?

THE DEFENDANT: Yes.

THE COURT: Mr. Pulasty, has your attorney, Mr. D'Alessio here explained to you what the charges against you in Indictment 1390-4 of the '85 Term are?

THE DEFENDANT: Yes, he did.

THE COURT: And you understand those charges?

THE DEFENDANT: I do.

THE COURT: All right.

I have in front of me two forms which have been filled out here today. One is a three page form which is -- we call an LR 27 and the other is a one page form called a summary of defendant's rights. Did Mr. D'Alessio go over these forms with you today and explain to you everything that's on them?

THE DEFENDANT: Yes, he did.

THE COURT: And did he explain all of your rights that are contained on these forms to you?

THE DEFENDANT: Yes, he did.

THE COURT: Do you understand those rights?

THE DEFENDANT: Yes, Sir.

THE COURT: Do you understand that by pleading guilty today, if you do that, you're going to be giving up many of those rights and you won't have them any more in this case?

THE DEFENDANT: Right.

THE COURT: For example, without going through all of the rights contained on these forms, just to make sure you understand, do you understand that if you plead guilty you will giving up, amongst other things, the right to have a trial by a jury in a Court in this matter?

THE DEFENDANT: I understand that.

THE COURT: Do you understand you're going to be, at that trial, you would be presumed to be innocent unless the State can prove you guilty beyond a reasonable doubt, do you understand you'd be giving up that right as well?

THE DEFENDANT: Right.

THE COURT: You understand you'd also be giving up the right to be represented by an attorney at the trial, to have your lawyer cross-examine any witnesses called against you and you'd be giving up the right to call any witnesses on your own behalf and to compel them to come to court by a subpoena?

THE DEFENDANT: I understand that.

THE COURT: All right.

You'd be giving up the right to testify at your trial or, on the other hand, to refuse to testify if you didn't want to. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You also understand that with regard to any statements you may have made to any law enforcement authority or if any evidence was seized from you, you'd be giving up the right to have a hearing before a court to determine if that evidence or that statement could be used against you at a trial.

All right, in short then, you understand that many of the rights that you would have, if you went on trial, you'd be giving up if you plead guilty?

THE DEFENDANT: Yes.

THE COURT: All the answers that were placed on these forms that you presented were true to the best of your knowledge and belief?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign these forms today voluntarily and of your own free will?

THE DEFENDANT: Yes, I did.

THE COURT: These two forms, the LR 27 and the summary of defendant's rights form will be filed with the Clerk and be made part of the record in these proceedings.

Mr. Pulasty, you're represented by Michael D'Alessio as your lawyer?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to talk this case over with him before coming to court today?

THE DEFENDANT: Yes, sir.

THE COURT: Has he answered all of your questions to your satisfaction?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with Mr. D'Alessio as your lawyer in this matter?

THE DEFENDANT: Yes.

THE COURT: Now, you've heard what the Prosecutor is offering by way of a plea offer, in short, if you will plead guilty to Count Two, I believe it is, or the indictment, charging second degree theft by deception, the State will agree to dismiss all of the other counts of the indictment and the State will recommend to me that any sentence you get me no greater than five years in prison. The State will also require that between you and your co-defendant, Ms. Furtney, full restitution be made with a dollar amount to be agreed upon by you and your attorneys and the Prosecutor. The charge right now as it stands is a total amount of $651,000 -- I'm sorry, $651,681.57. Well, I'm advised by counsel that there needs to be some adjustment for that amount. But, do you understand that as a part of this plea of guilty you will be agreeing, if you go along with this, to back an amount to be agreed upon between you and the State or if you and the Prosecutor cannot agree upon the total dollar amount, then I, after a hearing, will set that amount? Furthermore, I, after a hearing will set the amount that you're to pay and the amount that Ms. Furtney is to pay and that, I'm told, is part of the agreement as well. Now, other than those recommendations by the Prosecutor, did the Prosecutor make any other promises to you or any other offers to you?

THE DEFENDANT: No, sir.

THE COURT: No.

Did anyone offer you anything else to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Do you understand, Mr. Pulasty, that you do not have to plead guilty to any of these charges? You could plead not guilty and go to trial on all these charges if you wanted to.

THE DEFENDANT: I understand that.

THE COURT: All right.

If you did go to trial on these charges, you would be facing, if found guilty on all charges, the following maximum sentences on the conspiracy count, the maximum sentence of up to 10 years in prison, plus a fine of up to $100,000 or both.

On the second degree theft by deception, the count to which you're pleading, also a maximum of 10 years in prison and a maximum of $100,000 fine or both.

On the second degree misapplication of entrusted funds, the third count of the indictment, also a maxim of 10 years in prison and a fine of up to $100,000 or both.

On each of the remaining counts four through twenty-nine, which are fourth degree forgery counts, the maximum of 18 months in prison and a fine of up to $7,500 on each count or both.

Now, certainly there is the possibility and likelihood that if you went to trial and were found guilty on all charges, some of these charges would merge or blend together. The merger is the legal term we use. But, minimally it would seem to me that

assuming merger of all of these forgery counts and the misapplication into the second degree theft by deception, if you went to trial and were found guilty on all charges, you could be facing as much as up to 20 years in prison and fines of $200,000 or both; in addition to the possibility of, of course, of restitution having to be made. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, on the one count, that's if you went to trial, if you plead guilty as to the terms that the State is offering and your attorney is indicating to this point that you're willing to accept to the one count of second degree theft by deception, the maximum sentence I could impose upon you under law would be up to 10 years in jail, up to a $100,000 fine and the restitution. Is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, under the terms of the plea agreement if I were of a mind to give you anything more by way of sentence that the five years that the Prosecutor is recommending, before I did that I would have to offer you as your attorney the option or the choice of withdrawing your guilty plea and deciding to go to trial or accepting the plea with the possibility that you could get more than the five years that the State indicated they would recommend. Do you understand that?

THE DEFENDANT: Yes, Sir.

THE COURT: How old are you at this time, Mr. Pulasty?

THE DEFENDANT: Seventy and a half.

THE COURT: I'm correct in assuming that you're able to read and write the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Are you presently on parole or probation from any other --

THE DEFENDANT: No, sir.

THE COURT: -- on any other charges? You have no other pending charges against you at this time? All right.

Understanding all of the things I've explained to you now here in the courtroom and with the opportunity to discuss them with your attorney, do you wish to plead guilty to the second count of this indictment, charging second degree theft by deception?

THE DEFENDANT: Yes, I do.

THE COURT: Can you tell me, Mr. Pulasty, in your own words, what happened? The charges, just to place it on the record, that between the first day of August 1978, and the 31st day of July, 1983 in the City of East Orange, you committed, along with Barbara Furtney, theft by deception upon the New Jersey State Fireman's Association, by purposely obtaining valued over $75,000 specifically, according to the indictment, $625,504.43, from the general fund checking account of the New Jersey State Fireman's Association by creating or reinforcing the false impression that you and Barbara Furtney were entitled to receive and/or use those funds for your own benefit, whereas the true state of affairs was that you and Ms. Furtney were not entitled to the aforementioned property and this is contrary to the

provisions of our New Jersey State statute which makes this a crime of the second degree.

Can you tell me, sir, in your own words, what happened during that -- what appears to be five year period, '78 to '83?

THE DEFENDANT: As part of my function I was posting the books and apparently I was new on the job too. We didn't quite know all the ground rules until very recently.

THE COURT: What was your job there?

THE DEFENDANT: Posting -- well, the title was treasurer and as part of the duties I was required to post the results of all checks issued and summarize it each quarter and on an annual basis. At the end of each year we started from scratch again.

THE COURT: All right.

Specifically, with regard to this over six hundred thousand dollars that the State says you and Ms. Furtney took that you were not entitled to, can you tell me about that how you did that and give me some examples of what are some of the things that you did?

THE DEFENDANT: Some of the checks issued were for personal services and materials and it just got out of hand, I would say, and got away from us, got away from me, that is, you know.

MR. D'ALESSIO: There were several categories of checks. There were hundreds and hundreds of checks over the five year period and we can summarize them for you if you wish. But, basically, the State's case to which we plead is that personal

expenses were paid from the business, unauthorized expenses were paid and there were moneys paid to vendors who did not exist or vendors whose invoices were significantly less than that which was paid them.

THE COURT: Are these things true, Mr. Pulasty?

THE DEFENDANT: Yes, they are.

THE COURT: Among the other things you directed that checks be written out to people who did not exist?

THE DEFENDANT: I would say so, yes.

THE COURT: When these checks were -- what happened after the checks were written out, how did they get cashed?

THE DEFENDANT: I believe Ms. Furtney did the cashing. I wasn't aware of this at the time. But I did detect that there was something wrong after posting the ledgers.

THE COURT: Well, wait a minute. How would a check -- who would direct or tell Ms. Furtney to write out a specific check to someone who did not exist? Did you ever do that?

THE DEFENDANT: No, sir.

MR. D'ALESSIO: It was done with his knowledge, he did not direct the check.

THE DEFENDANT: That's right.

MR. D'ALESSIO: The checks were written by her, there was a stamp that was used to sign her name with his understanding and his approval. She would cash the checks, those checks were cashed.

THE COURT: Okay. When she -- in other words, you knew and authorized Ms. Furtney to cash the check to someone that didn't exist, among the other things?

THE DEFENDANT: Yes, sir.

THE COURT: When the check was cashed, what would happen with the money?

MR. D'ALESSIO: Over a period of five years, Judge, some of the money was divided between them. Many of the checks went --

THE COURT: I hear everything you're saying, Mr. D'Alessio, but you're not pleading guilty to this.

MR. D'ALESSIO: I understand that, Judge, but you're dealing with a man. This is a difficult case for him. He's 70 years old and I've been through this case for several months. I have to assist him as best I can in the plea.

THE COURT: I appreciate your assistance, but I would like to hear something -- let me explain something to you, Mr. Pulasty, in order for me to accept your plea of guilty, I have to be satisfied that you did this crime. Understand? I can't let you plead guilty to something you didn't do.

Now, if you're telling me you did it, I'd like to hear a little bit -- I don't need chapter and verse, I don't need everyone of hundreds and hundreds of checks. I need a little bit of the kind of things that you did.

Now, did you know you were taking money from the fireman's Association that you were not entitled to?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Did you either request, direct or were you aware of yourself, or Mrs. Furtney writing out checks to people who did not exist on that Fireman's Association account?

THE DEFENDANT: Yes, sir.

THE COURT: When those checks were written out and they were cashed by Mrs. Furtney?

THE COURT: What happened when she would cash the checks and get the money, did she ever give you any of that money?

THE DEFENDANT: I don't remember any amounts, Judge, really.

THE COURT: I didn't ask you if you remembered amounts. Did she ever give you money?

THE DEFENDANT: I would say yes, yes.

THE COURT: Did you take the money knowing that it did not belong to you?

THE DEFENDANT: Yes, sir.

THE COURT: Now, over the course of a five year period, again, subject to certain adjustments on the exact dollar amount, the State is charging that Mrs. Furtney and you did this or variations of what you just told me to the tune of over $600,000. Now, I don't expect you to have an exact amount in your mind, but are we talking in that range or ballpark?

THE DEFENDANT: I would say so, yes.

THE COURT: Prosecutor, do you wish to ask any additional questions of Mr. Pulasty with regard to the factual basis?

MR. TCHACK: The only additional question I would ask of Mr. Pulasty was whether he paid for those outside business expenses, the expenses of running his accounting business with checks to the New Jersey State Fireman's Association?

THE DEFENDANT: Yes, I did pay some of the bills.

THE COURT: All right.

You knew that this was Fireman's Association money but you used them for your own private business purposes?

THE DEFENDANT: Yes, sir.

THE COURT: All right, no other questions.

MR. TCHACK: No other questions.

THE COURT: Mr. D'Alessio, are you satisfied that Mr. Pulasty's plea is in all respect voluntary?

Mr. D'Alessio: Yes, Judge.

I would like to state for the record that there's been voluminous discovery in this case and the Prosecutor's Office has made it available to me and, in fact, made available some things to me which might otherwise be considered to be work product or privileged and I have been through -- I've got copies of everything I've requested and I've been through all of it and with my client. I'm satisfied that there's a basis for a guilty plea, your Honor.

THE COURT: All right.

Well, I've listened to everything that's been said and I'm aware of the nature of the discovery in this matter, although I'm certainly not privy to all of it, given the nature of the case. I've listened to everything Mr. Pulasty has said here today, I'm satisfied that he has entered a knowing, intelligent and voluntary plea of guilty. I'm satisfied Mr. Pulasty understands what he's charged with and the nature and elements of the offenses. I'm satisfied that he has established a sufficient factual basis to sustain the truth of the charge to which he's pleading guilty, which is the second count of the indictment, the count charging theft by deception, a second degree offense. I will accept the plea of guilty. I will fix the sentence date at February 21st, 1986.

MR. D'ALESSIO: I don't think I'm going to be --

THE COURT: All right. I'm sorry. Now that you pointed that out, I am --

MR. D'ALESSIO: I think I'm going to be out of the state.

THE COURT: I also am going to be unavailable that week. Can we make it the week after that?

February 28th, 1986.

With regard to the restitution matter which is going to be the subject of some discussion between the defense and the Prosecutor, is two weeks going to be enough time to determine whether or not the State and counsel can agree upon an amount upon the restitution?

MR. TCHACK: I think that is, Judge. If there's any serious problem, we'll advise you immediately. I think two weeks would be sufficient time.

MR. D'ALESSIO: I agree.

THE COURT: Mr. Prosecutor, you're to advise within two weeks of today's date, no later than January 27th, as to whether or not you've been able to come to an agreement as to the overall amount of restitution and any proportion thereof with regard to this defendant vis-a-vis the other defendant.

If you're able to agree upon an amount, of course so advise me. If you're not able to agree, I will fix, at that time, a date for a hearing and I'll request the probation department to pick up a full investigation on the restitution, Thank you.

MR. D'ALESSIO: Thank you, Judge.

(Whereupon the matter was concluded.)

3997-API

Supreme Court, U.S.
FILED
OCT 27 1994
OFFICE OF THE CLERK

(2)

NO. 94-609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOUIS PULASTY

Petitioner,

v.

STATE OF NEW JERSEY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURTHOUSE
NEWARK, NEW JERSEY 07102

HILARY L. BRUNELL, ESQ.
LEGAL ASSISTANT
ATTORNEY FOR RESPONDENT

The Copy Capitol, 29 Valley Road, Montclair, New Jersey 07042 • (201) 783-3891

32 pp

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT

POINT I: STATE CRIMINAL LAWS ARE NOT PREEMPTED BY ERISA; PENSION FUNDS WHICH ARE OTHERWISE PROTECTED UNDER ERISA ARE THEREFORE SUBJECT TO CRIMINAL RESTITUTION 8

POINT II: PETITIONER HAS FAILED TO DEMONSTRATE THAT THE RESULT REACHED BY THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH DECISIONS OF THIS COURT 15

POINT III: THE STATE COURT RULING IN THIS CASE IS NOT IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS 21

POINT IV: THERE IS NO FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE ENTRY OF PETITIONER'S GUILTY PLEA 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Brosamer v. Mark,
561 N.E.2d 767, 770 (Ind. 1990) ... 15,22

Commonwealth v. Federico,
419 N.E.2d 1374 (1981) 9,10

Ellis National Bank v. Irving Trust Co.,
786 F.2d 466 (2 Cir. 1986) 13,21

Guidry v. Sheet Metal Workers National
Pension Fund, 493 U.S.
365 (1990) 13,15,16

North Carolina v. Alford,
400 U.S. 25, 38 n.10 (1970) 23

Philpott v. Essex County Welfare Board,
409 U.S. 413 (1973) 18

Pomeranke v. Williamson,
478 N.W.2d 800 (Minn. App. 1991) ... 21

Porter v. Aetna Casualty Co.,
370 U.S. 159 (1962) 19

State v. Barboza,
115 N.J. 415, 421 n.1 (1989) 23

State v. Burten,
219 N.J.Super. 339 (Law Div. 1986) .. 10

State v. Newman,
132 N.J. 159 (1993) 14

State v. Pulasty,
136 N.J. 356, 361 (1994) 15

United States v. Brown,
744 F.2d 905, 910 (2 Cir. 1984) 17

United States v. Florence,
741 F.2d 1066, 1067 (8 Cir. 1984) ... 18

United States v. Palma,
760 P.2d 475, 479 (7 Cir. 1984) 18

Willet v. Georgia,
608 F.2d 538, 540 (5 Cir. 1979) 23

Statutes and Rules

N.J.S.A. 2C:20-4 .....

N.J.S.A. 2C:43-3 11

N.J.S.A. 2C:44-2a(2) 11

29 U.S.C. 1056 8

29 U.S.C. 1056(d)(1) 1,8

29 U.S.C. 1144(a) 9

29 U.S.C. 1144(b)(4) 12

38 U.S.C. 3101(a) 19

42 U.S.C. 407 18

INDEX TO APPENDIX

PLEA TRANSCRIPT..... Ra1-2

QUESTIONS PRESENTED

1. Whether a criminal restitution order is pre-empted by the anti-alienation provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1056(d)(1)?

2. Whether criminal restitution orders and civil judgments are sufficiently distinguishable to make case law concerning civil judgments inapplicable to the present case?

3. Whether pension funds covered by the Employment Retirement Income Security Act, 29 U.S.C. 1956, lose their protected status after disbursement to the pensioner?

4. Whether enforcement of state criminal restitution orders are consistent with the ERISA's underlying goal of protecting retirement funds for pensioners and their families?

5. Whether the Federal Constitution requires that a factual basis for a guilty plea be given by a defendant who does not proclaim innocence?

NO. 94-609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOUIS PULASTY

Petitioner,

v.

STATE OF NEW JERSEY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

The respondent, the State of New Jersey, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the New Jersey Supreme Court's decision reported at 136 N.J. 356, 642 A.2d 1392 (1994).

STATEMENT OF THE CASE

While the petitioner served as treasurer for the New Jersey State Fireman's Association, he and a co-defendant embezzled approximately $600,000 from the Association during a five year period. Petitioner pled guilty to second degree theft by deception under N.J.S.A. 2C:20-4, a crime carrying a five to ten year jail sentence. As part of his plea bargain, he agreed full restitution would be made.

Petitioner was sentenced on March 7, 1986 to a five year custodial term. Following a separate hearing held on May 16, 1986, petitioner was ordered to pay $453,378.32 in restitution. The hearing judge ordered that petitioner pay a lump sum of $200,000 and that the balance be paid in periodic installments.

Under the terms of the original restitution order, petitioner was required to make monthly payments of $2,000. After appeal, a new restitution hearing was held and the

periodic payment was reduced to $531 per month, an amount roughly equivalent to the $558 monthly pension received from the victim. This figure was arrived at by calculating petitioner's monthly income ($2,235), and deducting from it his monthly expenses ($1,493), leaving a balance of $742 per month. From this amount, the judge determined that petitioner had the ability to pay $531 per month, leaving him with a monthly excess of $211.

With regard to the lump sum, petitioner was credited with approximately $98,000 which he had attempted to sequester under an account in his wife's name and a second sum of $15,000 which he placed in a trust account with his attorney.

On September 25, 1989, the new restitution order was affirmed by the Appellate Division. On July 19, 1990, petitioner moved before the trial judge to further change the terms of the

restitution. He argued that his social security and pension fund benefits were exempted under federal law from assignment, garnishment or income execution. None of these arguments were raised on direct appeal.

While petitioner's motion was pending, it was discovered that between February 12, 1988 and May 2, 1988, petitioner filed three separate requests with the Internal Revenue Service to increase the amount withheld from his pension check to $260 per check. He did this for 1988 and 1989, years in which he had no taxable income. Petitioner evidently hoped to reduce the amount of money available to satisfy the restitution order and recoup the funds by requesting refunds from the I.R.S. This scheme was uncovered, however, and the judge found defendant to be $5,534.17 in arrears.

On October 31, 1990, an amended order of restitution was entered. Rejecting the

argument that petitioner's pension benefits were unavailable to satisfy the restitution order, the trial judge neither reduced nor eliminated the $531 monthly payment. The judge did, however, reword the restitution order to eliminate any language requiring assignment of pension benefits. The amended order also directed defendant to immediately pay the $5,534.17 arrearage.

It is from this amended order that petitioner now appeals.

REASONS FOR DENYING THE WRIT

POINT I

STATE CRIMINAL LAWS ARE NOT PRE-EMPTED BY ERISA; PENSION FUNDS WHICH ARE OTHERWISE PROTECTED UNDER ERISA ARE THEREFORE SUBJECT TO CRIMINAL RESTITUTION

At the hearing below, it was established that the pension benefits received by the petitioner from the victim were part of a plan covered by the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056. ERISA contains an anti-alienation clause which provides, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). Petitioner claimed his pension benefits were therefore unavailable to satisfy the restitution order below.

ERISA contains a broad pre-emption provision which provides, under section (a), that the statute shall "supersede any and all state laws" relating to any covered employee

benefit plan. 29 U.S.C. 1144(a). The provision sets forth specific exceptions to this pre-emption language. Relevant here is section (b)(4):

> Subsection (a) of this section shall not apply to any generally applicable criminal law of a state.

Thus, if state criminal restitution is a "generally applicable criminal law" within the meaning of the statute, section (b)(4) is dispositive of petitioner's claims. In other words, if criminal restitution is a "general" penal law, ERISA does not preclude the application of such law to pension funds.

The definition of "generally applicable law" can be found in Commonwealth v. Federico, 419 N.E.2d 1374 (1981), a case deciding whether an employer's failure to make required contributions to a pension plan can be prosecuted under state law. The case holds:

> The 1144(b)(4) exception from pre-emption for "generally applicable" state criminal laws

> appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed towards criminal laws that are intended to apply to conduct generally criminal laws against larceny and embezzlement for example. By virtue of 1144(b)(4), a state is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan. But by limiting the 1144(b)(4) exception to criminal laws of general applicability, Congress apparently intended to preempt state criminal statutes aimed specifically at employee benefit plans.

Federico, supra at 1377-78. The court concluded that penal laws enforcing contribution requirements to pension plans are not generally applicable laws. Such laws are designed solely to regulate employee benefit plans and are therefore pre-empted by ERISA. See also, State v. Burten, 219 N.J.Super. 339 (Law Div. 1986).

In the present case, the question is whether state criminal restitution statutes are pre-empted by ERISA if the petitioner must draw on pension funds to satisfy their terms. Nothing in the restitution statutes themselves indicates they are pre-empted by ERISA. Authority for restitution is derived from N.J.S.A. 2C:43-3 which permits a sentencing court to impose restitution on any person who has been convicted of "an offense". N.J.S.A. 2C:44-2a(2) makes restitution potentially applicable in any case where the sentencing judge finds that deterrence or rehabilitation would be served by the imposition of restitution. Thus, restitution is clearly a penal sanction of a general nature which is applicable to a broad range of criminal conduct.

That a criminal restitution order may reach pension funds which are otherwise protected by ERISA does not alter this conclusion. Burten and Federico teach that

pre-emption is not required simply because the State enacts criminal regulatory law in an area covered by ERISA. 29 U.S.C. 1144(b)(4) indicates that some overlap is permissible. Only in those instances where the State attempts to enforce criminal statutes specifically designed to regulate employee benefit plans will the pre-emption provisions of ERISA preclude State action. Here, the restitution order is no more precluded by ERISA than is the petitioner's underlying theft conviction. Both the conviction and the sentence "relate to" an employee benefit plan, but neither rests on a statute aimed solely at employee benefit plans. Thus, neither runs afoul of ERISA's pre-emption provisions.

The exemption of criminal restitution orders from ERISA's anti-alienation provisions is entirely consistent with the goals of ERISA. ERISA has never been read to preclude all assignments and alienations of pension fund

benefits. Ellis National Bank v. Irving Trust Co., 786 F.2d 466, 470 (2 Cir. 1986). Family support orders are routinely recognized as special exceptions. Id. Like the family support order, the exemption for the enforcement of criminal law is based on the paramount need of the claimant. Here the "claimant" is the State of New Jersey, which surely has a fundamental interest in deterring those in fudiciary positions - like the one held by petitioner - from using such positions to embezzle funds. By exempting criminal laws from the statute, ERISA ensures that the State will pursue its interest, enabling the State to safeguard pension funds from would-be thieves, thereby furthering ERISA's underlying goal of ensuring that pension funds will be available for pensioner's and their families. Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 376 (1990). Moreover, New Jersey's criminal restitution statute is particularly

compatible with ERISA, given its mandate to consider the defendant's ability to pay. State v. Newman, 132 N.J. 159 (1993). Hence, restitution orders in New Jersey do not impede ERISA's goal of protecting the welfare of the pensioner and his family. In short, there is both statutory case precedent and social policy justification for the principle that ERISA was never intended to preclude the enforcement of State criminal restitution orders.

POINT II

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE RESULT REACHED BY THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH DECISION OF THIS COURT

The New Jersey Supreme Court's holding in this case was that pension funds lost their protected status once they were paid out to petitioner and that converted funds could therefore be used to offset the restitution order. The court observed that ERISA was designed only to guarantee a steady stream of income to pensioners, "not to make them judgment proof". State v. Pulasty, 136 N.J. 356, 361 (1994), citing Brosamer v. Mark, 561 N.E.2d 767, 770 (Ind. 1990). Defendant claims this interpretation of ERISA conflicts with this Court's holding in Guidry v. Sheet Metal Workers National Pension Fund, supra, at 493 U.S. 365.

No such conflict exists. Guidry interprets ERISA to determine the "narrow question of whether that judgment may be

collected through a particular means - a constructive trust placed on the pension". Id. at 376 (emphasis is the Court's). Thus, Guidry dealt with the attempt to divert pension funds before they were actually received by the pensioner. Here, the amended restitution order was re-worded to eliminate any reference to the assignment of pension funds. (See Statement of the Case, herein). Unlike Guidry, the petitioner in this case actually received his pension benefits.

Guidry is also distinguishable on other grounds, albeit ones not addressed by the New Jersey Supreme court. Guidry was a civil case which held that ERISA's anti-alienation provisions precluded all forms of garnishment of pension funds to satisfy civil judgments. It provides no authority for the proposition that one who is convicted of a theft-related offense is insulated from criminal penalties such as restitution. Criminal and civil

penalties are not viewed as interchangeable. United States v. Brown, 744 F.2d 905, 910 (2 Cir. 1984). Procedural rules applicable to civil judgments do not necessarily apply to criminal restitution, even if such restitution has "characteristics of a civil judgment". Id. at 909.

The distinction between criminal and civil penalties is well recognized. In United States v. Brown, supra, the Court held that criminal restitution is not subject to the same procedural rules which apply to civil judgments:

> We reject the premise of defendant's argument that a sentencing provision with characteristics similar to that of a civil judgment is subject to the requirements of a civil adjudication. So long as the restitution is a permissible form of punishment, it is not subject to civil requirements simply because it also achieves some of the purposes of a civil judgment. Restitution undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some

> offenders less likely to be imposed than restitution. Restoring the victim's property also serves the legitimate penal purpose of vindicating society's interest in peaceful retribution. Finally, restitution can be a useful step toward rehabilitation, a consequence specifically emphasized by congress.

Id. at 909. See also, United States v. Palma, 760 F.2d 475, 479 (7 Cir. 1984) (observing the differences between criminal and civil restitution); United States v. Florence, 741 F.2d 1066, 1067 (8 Cir. 1984) (same). Given these considerations, it would be error to read a civil case like Guidry to cover criminal penalties as well as civil.

Nor was the New Jersey Supreme Court's decision in conflict with Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973). Philpott holds that social security benefits deposited in a trust account were not available to reimburse the State of New Jersey for welfare disbursements. The benefits were protected by 42 U.S.C. 407 which imposed a

broad bar against the use of any legal process to reach "moneys paid or payable" as social security benefits. Funds deposited in the trust account on the pensioner's behalf, not yet disbursed from that account, were considered "moneys paid" and thus exempt from any claimant. Accord, Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (civil creditor cannot attach savings and loan accounts into which disability compensation protected by 38 U.S.C. 3101(a) have been deposited).

In the present case, the State did not seek to attach petitioner's pension funds. As noted above, the restitution order was worded to avoid any reference to pension funds. More importantly, the amount of the periodic payment was based on petitioner's income minus expenses. (See Statement of the Case, herein). Thus the judge did not simply require that petitioner divest himself of pension funds. Accordingly, the order he issued had all the

earmarks of criminal restitution and none of the characteristics of the civil remedies considered in Guidry and Philpott.

It follows from the foregoing that the New Jersey Supreme Court's decision was not inconsistent with the holdings of this Court.

POINT III

THE STATE COURT RULING IN THIS CASE IS NOT IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS

Petitioner contends the result in the instant case is inconsistent with decisions in other jurisdictions. However, the two cases cited by petitioner are easily distinguishable in that they do not involve the enforcement of state penal laws.

Ellis National Bank v. Irving Trust Co., supra at 786 F.2d 466, involved an attempt by a trustee of an ERISA protected plan to set up a constructive trust of funds stolen from the plan. The Ellis Court specifically noted that the case did not involve criminal sanctions. Id. at 470.

In Pomeranke v. Williamson, 478 N.W.2d 800 (Minn. App. 1991), the Court considered whether ERISA protected funds could be released to satisfy court ordered restitution to the victims of a pensioner's criminal conduct. The

finding that the funds were unavailable for this purpose turned on the conclusion that the restitution was not a criminal sanction: it was not a condition of probation and it was docketed as a civil judgment. Id. at 282.

Petitioner also mentions a possible conflict with Brosamer v. Mark, supra, based on the protected status of social security funds. However, the restitution order below did not reach petitioner's social security benefits since the pension benefits ($558 per month) were sufficient to satisfy the monthly payments ($531 per month). Any holding in Brosamer relevant to the exemption of social security benefits is therefore of no consequence to the instant case.

POINT IV

THERE IS NO FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE ENTRY OF PETITIONER'S GUILTY PLEA

Petitioner contends that his guilty plea was entered without a sufficient factual basis. However, a factual basis for a plea is not constitutionally required unless the entry of the plea is accompanied by a claim of innocence. North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970); Willet v. Georgia, 608 F.2d 538, 540 (5 Cir. 1979); State v. Barboza, 115 N.J. 415, 421 n.1 (1989).

Petitioner has never proclaimed his innocence. At the plea hearing, he expressly acknowledged his participation in the embezzlement scheme. (Respondent's Appendix 1-2). Hence, there is no federal constitutional question raised by the entry of petitioner's plea.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR

Hilary L. Brunell

HILARY L. BRUNELL, ESQ.
LEGAL ASSISTANT

HLB:md
DATE: October 18, 1994

THE COURT: What was your job there?

THE DEFENDANT: Posting -- well, the title was treasurer and as part of the duties I was required to post the results of all checks issued and summarize it each quarter and on an annual basis. At the end of each year we started from scratch again.

THE COURT: All right.

Specifically, with regard to this over six hundred thousand dollars that the state says you and Ms. Furtney took that you were not entitled to, can you tell me about that how you did that and give me some examples of what are some of the things that you did?

Ral

THE DEFENDANT: Some of the checks issued were for personal services and materials and it just got out of hand, I would say, and got away from us, got away from me, that is, you know.

MR. D'ALESSIO: There were several categories of checks. There were hundreds and hundreds of checks over the five year period and we can summarize them for you if you wish. But, basically, the state's case to which we plead is that personal expenses were paid from

the business, unauthorized expenses were paid and there were monies paid to vendors who did not exist or vendors whose invoices were significantly less than that which was paid them.

THE COURT: Are these things true, Mr. Pulasty?

THE DEFENDANT: Yes, they are.

THE COURT: Among the other things you directed that checks be written out to people who did not exist?

Ra 3

THE DEFENDANT: I would say so, yes.

THE COURT: When these checks were--what happened after the checks were written out, how did they get cashed?

THE DEFENDANT: I believe Ms. Furtney did the cashing. I wasn't aware of this at the time. But I did detect that there was something wrong after posting the ledgers.

THE COURT: Well, wait a minute. How would a check--who would direct or tell Ms. Furtney to write out a specific check to someone who did not exist? Did you ever do that?

THE DEFENDANT: No, sir.